Supreme Court, U.S.
FILED

98 127 JUL 9 1998

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No. _____

In The
Supreme Court of The United States
October Term 1997

ALEX CAMPOS, et al.
Petitioners,

v.

TICKETMASTER CORPORATION
Respondents.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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121 pp

QUESTIONS PRESENTED

Plaintiffs in this case seek damages and injunctive relief under the federal antitrust laws for consumers who directly purchased services from defendant Ticketmaster Corporation. Plaintiffs' Complaint alleged that consumers suffered direct injury by paying supracompetitive prices to defendant because of defendant's unlawful monopolization of the ticket delivery market. Nevertheless, in a decision flying in the face of established precedent, the district court held that plaintiffs lacked standing and dismissed the Complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The court of appeals ruled (in a 2 to 1 decision) that the plaintiff-consumers lacked standing to assert a damages claim under § 4 of the Clayton Act because they are indirect purchasers within the meaning of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). The court of appeals therefore affirmed the district court's order dismissing the plaintiffs' claim for damages. This petition presents the following questions:

1. Was the Eighth Circuit correct that a monopolist is immune from antitrust liability whenever it has engaged in any type of "antecedent transaction" prior to selling its supracompetitively-priced services to plaintiff-consumers?

2. Does the indirect purchaser rule of *Illinois Brick* bar a damage suit by plaintiff-consumers who purchased supracompetitively-priced services directly from an alleged antitrust violator?

3. Does *Illinois Brick* require that every antitrust plaintiff name every alleged co-conspirator as a defendant?

PARTIES TO THE PROCEEDING

The five cases that were consolidated in the Second Consolidated and Amended Complaint ("Complaint") were originally filed in the Northern District of Illinois, the Northern District of Georgia, the District of Massachusetts, the Western District of Washington, and the Eastern District of Michigan. The Judicial Panel on Multidistrict Litigation transferred these and other pending cases against Ticketmaster to the United States District Court for the Eastern District of Missouri pursuant to its authority under 28 U.S.C. § 1407 *et. seq.*

The named plaintiffs in the Georgia case are Alex Campos, Dania Campos, and Albert Alfonso. The named plaintiffs in the Illinois case are Stephen Hines, Dirk Schnable, Todd Vicsik, Jamie Saltzman, Mike Ellis, Brad Cheskes, and Suzanne Crawford. The named plaintiff in the Massachusetts case is Joseph Crowley. The named plaintiff in the Washington case is Tony Stephens. The named plaintiffs in the Michigan case are Ebon Petty, Arlean Azzo, John Azzo, Scott Henry Buettner, Scott J. Freedland, Brian Homer, Roger Hutton, Garret Pfetzing, Christopher W. Quinn, Tohomas Rockov, James Stewart, and Hilary Tompkins.

The sole defendant is Ticketmaster Corporation.

RULE 29.6 STATEMENT

Pursuant to Sup. Ct. Rule 29.6, Petitioners hereby state that they are individuals and thus have no corporate parents or subsidiaries.

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Plaintiffs respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, *see* Appendix ("Apdx.") A, is reported 140 F.3d 1166 (8th Cir. 1988). The opinion of the district court is reprinted at Apdx. B, and may be found at 929 F. Supp. 1272.

JURISDICTION

The court of appeals entered its judgment on April 10, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides, in pertinent part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

The complete text of the relevant provisions of the Clayton and Sherman Acts is set forth in Apdx. D.

STATEMENT OF THE CASE

Petitioners respectfully suggest that this case presents three issues worthy of certiorari. First, the court of appeals held that monopolists are immune from antitrust damages suits brought by consumers whenever the monopolist engages in any "antecedent transaction." However, since monopolists *of necessity* use "antecedent transactions" to establish their monopolies, the court of appeals' analysis would allow *all* monopolists to avoid antitrust liability. As dissenting Circuit Judge Arnold pointed out, the "antecedent transaction" analysis is an unprincipled departure from this Court's ruling in *Illinois Brick*. This Court should give the "antecedent transaction" test an early burial to prevent it from completely undermining private enforcement of the federal antitrust laws.

Second, the court of appeals incorrectly held that the indirect purchaser rule of *Illinois Brick* bars plaintiffs' damage suit under Section 4 of the Clayton Act even though plaintiffs are direct purchasers of ticket distribution services from defendant Ticketmaster Corporation ("Ticketmaster"). By holding that *Illinois Brick* bars direct purchasers from suing for damages, the court of appeals has unjustifiably expanded *Illinois Brick* in direct conflict with decisions in the Seventh and Ninth Circuits.

Third, the court of appeals held that antitrust plaintiffs must name any and all co-conspirators to maintain a suit under Section 4 of the Clayton Act. Although the Third and

Fifth Circuits agree with the Eighth Circuit,[1] the Seventh and Ninth Circuits disagree and hold that, amidst allegations of sellers conspiring with intermediaries in the distribution chain, *Illinois Brick* is no bar to suit.[2] The requirement that a plaintiff name every co-conspirator as a codefendant could often have the effect of allowing nationwide antitrust violations to go unremedied since no court would have jurisdiction or venue over all the co-conspirators.

A. Factual Summary

1. Plaintiffs purchase tickets directly from Ticketmaster

This case arises from the multitude of "service," "convenience," and "handling" charges that plaintiffs pay directly to defendant Ticketmaster. Plaintiffs pay these fees every time they purchase tickets to a large-scale popular music concert from Ticketmaster. Because Ticketmaster has monopolistic control of the ticket delivery market nationwide, plaintiffs must pay Ticketmaster's excessive fees no matter where they live. (Apdx. C at 45, 53-54; ¶¶ 1, 31-33.)[3]

Ticketmaster dominates the market for delivering

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[1] *See In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1163 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980); *Link v. Mercedes-Benz of N. Am., Inc.*, 788 F.2d 918, 933 (3rd Cir. 1986).

[2] *See Arizona v. Shamrock Foods Co.*, 729 F.2d 1208 (9th Cir. 1984), *cert. denied*, 469 U.S. 1197 (1985); *Fontana Aviation, Inc. v. Cessna Aircraft Co.*, 617 F.2d 478 (7th Cir. 1980); *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 605 (7th Cir. 1997).

[3] All "¶" references herein are to the Second Consolidated and Amended Complaint, attached as Apdx. C.

tickets to large-scale popular music concerts.[4] The vast majority of consumers purchase tickets directly from Ticketmaster, either by phone or at a designated Ticketmaster outlet.[5]

2. Use of exclusive dealing contracts

Ticketmaster collects its excessive fees from consumers pursuant to long-term exclusive dealing contracts with venues and promoters. The exclusive contracts with venues prevent other ticket service companies from selling tickets to that venue's events. The contracts, designed to exclude actual and potential competitors, have durations of up to seven years.

By the year 1991, Ticketmaster had exclusive contracts with venues representing 63.2 percent of the country's 9.9 million seats. In addition, Ticketmaster has exclusive dealing provisions with nearly every major concert promoter in the nation. Since most popular music performers have no choice but to use these promoters and venues, Ticketmaster is the exclusive ticket distributor even in the rare case where it lacks an exclusive dealing contract with a

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[4] The relevant market does not include the delivery of tickets to "family attractions" and professional sports. These tickets carry lower service and handling fees and have a different target market than large-scale popular music concerts. (Apdx. C at 53; ¶ 30.)

[5] A limited number of consumers purchase tickets at the venue box office, which may be operated by either the venue or by Ticketmaster. Ticketmaster's contracts with the venues often limit box office hours, thereby effectively eliminating all competition with Ticketmaster since shows tend to sell out quickly. Sometimes Ticketmaster itself operates the box office as an outlet and collects its service fees. (Apdx. C at 52-55; ¶¶ 27-28, 32, 35.)

venue. (Apdx. C at 51-52, 57-60; ¶¶ 22, 43-47.)

Ticketmaster's contracts with promoters and venues give Ticketmaster ironclad control over ticketing for large-scale popular music concerts at major venues. Indeed, Ticketmaster boasts that it has never lost a significant concert venue to a competitor. As a result of the foregoing contracts, exclusive dealing provisions, and paybacks, Ticketmaster sells 90 percent of all tickets to large-scale popular music concerts in the United States. (Apdx. C at 55-58; ¶¶ 38, 43.)

3. Venues and Promoters Benefit as Co-Conspirators

In return for its long-term exclusive contracts, Ticketmaster makes substantial up-front payments (or paybacks) to venues and promoters. These lucrative paybacks give venues and promoters a financial interest in keeping Ticketmaster in control of the market. (Apdx. C at 45-46, 59-60; ¶¶ 2, 46-48.)

The venues and promoters therefore profit from Ticketmaster's ability to raise the "convenience charges" paid by consumers. They benefit from Ticketmaster's monopoly and exclusive long-term contracts because Ticketmaster pays them substantial advances as a pre-payment for anticipated commissions on ticket sales in the future. After Ticketmaster has sold enough tickets to cover the advance payment, the venue continues to make money on every ticket sold by Ticketmaster for the duration of the contract. Because venues and promoters reap a percentage of Ticketmaster's exorbitant service charges, they have a vested interest in keeping service

charges high and Ticketmaster in control.[6]

4. As part of its successful scheme to monopolize, Ticketmaster has eliminated competition

Ticketmaster's monopolistic network of long-term exclusive dealing contracts with venues and promoters has dramatically eroded the ability of others to compete freely. But Ticketmaster's scheme to monopolize did not stop there.

To entrench its monopolistic power, Ticketmaster systematically bought out at least fourteen of its competitors. Ticketmaster bought out its only national competitor, Ticketron, in 1991 and promptly shut it down. Before and after acquiring Ticketron, Ticketmaster acquired regional computerized ticket delivery providers, including the South East-Atlanta Ticket Service in Georgia, Select-a-Seat in Florida, CATS in Kansas, Select-A-Seat in Denver, Ticketworld USA in New York City and Detroit, TicketPro in New England, Dayton's Ticketing in Minneapolis, Softix in Florida, Tickethub in Memphis, and the Southland Corp. in Texas. Ticketmaster also entered licensing and illegal market allocation agreements with Bay Area Seating Service in San Francisco. As a result of its acquisitions, Ticketmaster has no nationwide competitors in the business of distributing tickets to consumers. (Apdx. C. at 56-57; ¶¶ 39-41.)

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[6] Apdx. C at 45-46, 57-61, 63-64, 66-67, 70-71, 73-78; ¶¶ 2, 43-44, 46, 51, 53, 57, 67, 86, 100-03, 109-10, 112-14, 118-22.

5. Ticketmaster injures consumers by charging supracompetitive prices

Ticketmaster acquired and maintains its monopoly over ticket delivery services for the purpose of charging consumers inflated service fees. Plaintiffs have, as a result, been forced to pay Ticketmaster's artificially inflated fees and have thereby suffered damages. (Apdx. C at 71-79; ¶¶ 88-94, 99-104, 107-14, 117-23, 126-31.)

Unchecked by competition, Ticketmaster has steadily raised its service and handling fees in the ticket delivery market. Prior to Ticketmaster's 1991 purchase of its only national competitor, Ticketron, service fee charges were typically $1.50 per ticket. Indeed, most or all of Ticketmaster's few struggling competitors still manage to charge substantially less in service charges than does Ticketmaster. As a result of Ticketmaster's monopoly power, however, its hefty increases in ticket service charges have far outstripped increases in ticket prices. Ticketmaster now charges plaintiffs between $3.00 and $15.00 per ticket in "service charges." (Apdx. C at 54, 60-62; ¶¶ 33, 48-49, 51-53.)

B. The Opinions Below

The trial court had jurisdiction over these consolidated cases under the Clayton Act and the Sherman Act, 15 U.S.C. §§ 15(a), 22 and 26, and 28 U.S.C. § 1331. The five cases that were consolidated in the Second Consolidated and Amended Complaint were originally filed against Ticketmaster and various other defendants in the Northern

District of Illinois, the Northern District of Georgia, the District of Massachusetts, the Western District of Washington, and the Eastern District of Michigan. The Complaint names Ticketmaster as the sole defendant. The Judicial Panel on Multidistrict Litigation transferred these and other pending cases against Ticketmaster to the United States District Court for the Eastern District of Missouri pursuant to its authority under 28 U.S.C. § 1407 *et. seq.*

The Complaint alleged that Ticketmaster violated § 1 of the Sherman Act by engaging in price fixing with various concert venues and promoters, § 2 of the Sherman Act by monopolizing, or attempting to monopolize, the market for ticket distribution services, and § 7 of the Clayton Act by acquiring its competitors. Plaintiffs sued to recover their payment of monopoly overcharges and to enjoin future violations of the Sherman Act.

The district court dismissed the Complaint on the ground that plaintiffs lacked standing to sue because they were indirect purchasers within the meaning of *Illinois Brick*. The district court also held that three of the cases were improperly venued, and dismissed the cases originally filed in Georgia, Washington, and Michigan. *See* Apdx. B.

The Eighth Circuit affirmed the district court's dismissal of the plaintiffs' claims for treble damages under § 4 of the Clayton Act. Although the plaintiffs bought ticket distribution services directly from alleged monopolist Ticketmaster, the Eighth Circuit found that the plaintiffs bore "some portion of a monopoly overcharge only by virtue of an antecedent transaction between the monopolist and another,

independent purchaser." (Apdx. A at 9.)[7] Therefore, the court of appeals held that plaintiffs were indirect purchasers and barred from suit within the meaning of *Illinois Brick*. Recognizing that the result would be different in other circuits, the court of appeals held that: "In this circuit, an antitrust plaintiff cannot avoid the *Illinois Brick* rule by characterizing a direct purchaser as a party to the antitrust violation, unless the direct purchaser is joined as a defendant." (*Id.* at 13, n.4.)[8] As Judge Arnold noted in his dissent, the majority's phrase "antecedent transaction" "appears nowhere in the authorities relied on, and, in fact, a mere 'antecedent transaction' will not turn all purchasers of a monopolized product into indirect purchasers for the purposes of *Illinois Brick*." (*Id.* at 21.)

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[7] The Eighth Circuit believed that the venues "purchased" an indescribable something from Ticketmaster.

[8] In addition, the court of appeals reversed the district court's findings that three of the suits were improperly venued, and that plaintiffs could not bring a claim for injunctive relief under § 16 of the Clayton Act, and remanded for further proceedings.

REASONS FOR GRANTING THE PETITION

I.

I. THE EIGHTH CIRCUIT'S NEW RULE – THAT ANY "ANTECEDENT TRANSACTION" WILL IMMUNIZE AN ANTITRUST VIOLATOR FROM LIABILITY – WILL UNDERMINE PRIVATE ENFORCEMENT OF THE ANTITRUST LAWS

A. The Court of Appeals Fabricated The "Antecedent Transaction" Standard Out of Whole Cloth

As dissenting Circuit Judge Arnold realized, the Eighth Circuit's "antecedent transaction" analysis is a stunning and unwarranted departure from *Illinois Brick* in particular and from this Court's antitrust jurisprudence in general. Not only does the "antecedent transaction" test allow the monopolist Ticketmaster to retain the fruits of its unlawful conduct, but the "antecedent transaction" test will become the friend of antitrust violators around the nation. Since all monopolists engage in "antecedent transactions" in order to create their monopolies, the court of appeals' decision could bar all damage claims against monopolists. This Court should accordingly give the "antecedent transaction" test an early burial, before the analysis does untold mischief in courts around the nation.

Judge Arnold cogently summarized the fundamental flaw in the Eighth Circuit's analysis:

> Citing *Illinois Brick* itself, numerous other

> cases, and several law review articles, the court concludes that "[a]n indirect purchaser is one who bears some portion of a monopoly overcharge only by virtue of an antecedent transaction between the monopolist and [a direct purchaser.]" The phrase "antecedent transaction," however, appears nowhere in the authorities relied on, and, in fact, a mere "antecedent transaction" will not turn all purchasers of a monopolized product into indirect purchasers for the purposes of *Illinois Brick*.
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> * * *
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> *Illinois Brick* requires more than a mere antecedent transaction for an antitrust defendant to avoid suit from an "indirect purchaser" under Section 4. Instead, the antecedent transaction must have been one in a direct vertical chain of transactions and it must have resulted in the "passing on" of monopoly costs from the direct purchaser to the indirect purchaser. *Illinois Brick*, 431 U.S. at 746. (Apdx. A at 21-22.)

The standard is not, nor can it be, that an antitrust defendant such as Ticketmaster can retain the fruits of its wrongdoing simply because it has tangential business relationships apart from the direct, vertical transactions it engages in with the plaintiff-consumers here. In this complex

economic world, it is difficult to imagine *any* monopolist that does not engage in "antecedent transactions" prior to selling its goods or services to directly-purchasing consumers. Indeed, the creation and establishment of a monopoly *requires* that the monopolist engage in "antecedent transactions" – such as the acquisition of competitors and the exclusive dealings contracts with venues and promoters complained of here.

In short, the broad and unfocused "antecedent transaction" analysis created by the Eighth Circuit can potentially apply to *every* monopolization case. Allowing the "antecedent transaction" rule to stand could therefore immunize all monopolists from liability.

B. The Court Of Appeals' "Antecedent Transaction" Analysis Undermines Private Antitrust Enforcement

The Eighth Circuit's unbridled and unprecedented reading of the *Illinois Brick* decision undermines private antitrust enforcement. Since vigorous private enforcement of the antitrust laws is vital if the goals of the Sherman and Clayton Acts are to be realized, the Eighth Circuit's misguided decision should not be allowed to stand.

The Eighth Circuit's unprincipled decision providing only injunctive remedies allows Ticketmaster to retain the monetary rewards of its anticompetitive conduct, unpunished and undeterred. Furthermore, by depriving plaintiff-consumers of a meaningful remedy, the court's decision also ensures that private enforcement against future

anticompetitive conduct will languish.[9]

As this Court has repeatedly emphasized in other antitrust actions, antitrust damages were designed with the "intent to punish past, and to deter future, unlawful conduct...." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981). The Eighth Circuit's decision does nothing to punish or deter Ticketmaster from engaging in anticompetitive conduct.

Moreover, beyond the confines of this case, the Eighth Circuit's decision undermines the bulwark of antitrust enforcement – the private action. Without a meaningful remedy to counterbalance "the difficulty of maintaining a private suit," under the antitrust laws a private plaintiff will not have an incentive to litigate against the unlimited resources of large corporate defendants. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 (1977).

"By offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve as 'private attorneys general.'" *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972). "The treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement

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[9] Because of their substantial investment of time and expense in this case, plaintiffs have signaled their intention to pursue injunctive relief on remand to the district court. However, they would not have brought this case in the first instance had they been aware of the Eighth Circuit's "antecedent transaction" rule barring recovery of money damages. More importantly, the Eighth Circuit's decision would allow Ticketmaster to retain millions of dollars in gains which are ill-gotten if plaintiffs' allegations are correct.

scheme, posing a crucial deterrent to potential violators." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985). The "[e]ffective enforcement of the antitrust laws has always depended largely on the work of private attorney generals...." *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 129 (1986).

Accordingly, the Eighth Circuit's apparent desire to chill private enforcement of the antitrust laws can not be countenanced by this Court. This Court should grant certiorari to re-emphasize the continuing vitality of the private enforcement action.

II. THE COURT OF APPEALS EXPANDED THE INDIRECT PURCHASER RULE IN AN UNPRINCIPLED MANNER THAT IS INCONSISTENT WITH *ILLINOIS BRICK* AND IN DIRECT CONFLICT WITH DECISIONS OF THE SEVENTH AND NINTH CIRCUITS

A. Under *Illinois Brick*, An "Indirect Purchaser" Is Someone In A Vertical Supply Chain Who Purchases A Product From Someone Other Than The Antitrust Violator

This Court first enunciated the indirect purchaser doctrine in *Hanover Shoe v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968). There, the defendant in a Sherman Act suit, a manufacturer of shoe-making equipment, defended on the ground that the plaintiff, a shoe maker who bought defendant's equipment, had "passed on" any monopoly overcharge to its own customers, the wholesale purchasers of

its shoes. Therefore, defendant claimed, the plaintiff-shoe maker suffered no injury. This Court rejected that defense, and held that an antitrust defendant would not be permitted to defend against a damages suit on the ground that the plaintiff had passed on the cost of defendant's wrongdoing to the plaintiff's customers. This Court refused to complicate antitrust enforcement by requiring an apportionment of damages between direct and indirect purchasers of the defendant's product which, in turn, would dilute a plaintiff's incentive to enforce the antitrust laws.

In *Illinois Brick*, this Court held that second tier, indirect purchasers from the antitrust violator could not sue for damages – only the first tier, direct purchasers could sue. In *Illinois Brick*, the defendant manufactured bricks and distributed them to masonry contractors who, in turn, submitted bids to general contractors. The general contractors then submitted bids to build brick structures for the plaintiffs. *Illinois Brick*, 431 U.S. at 727. Thus, as this Court noted:

> The only way in which the antitrust violation alleged could have injured respondents is if all or part of the overcharge was passed on by the masonry and general contractors to respondents, rather than being absorbed at the first two levels of distribution. (*Id.*)

In those circumstances, this Court held, the entire antitrust "injury" is suffered by the direct purchaser, and "indirect purchasers" further down the distribution chain have not suffered injury within the meaning of Section 4 of the

Clayton Act. *Id.* at 729. *Illinois Brick* therefore avoids the "famously difficult" task of apportioning damages among direct and indirect purchasers, *In re Brand Name Prescription Drugs*, 123 F.3d at 605, and prevents double recovery.

This Court has only applied the indirect purchaser rule to bar a plaintiff's suit when the antitrust violator has sold supracompetitively-priced goods to a direct purchaser who, in turn, sold the same goods to the putative plaintiff. *See*, *Illinois Brick*, 431 U.S. at 730-31; *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 207 (1990):

> Like the State of Illinois in Illinois Brick, the consumers in this case have the status of indirect purchasers. In the distribution chain, they are not the immediate buyers from the alleged antitrust violators.

In all its indirect purchaser cases, this Court has stressed this relationship: The indirect purchaser pays the alleged overcharge to *someone other than the antitrust violator*.

B. When A Plaintiff Pays Antitrust Overcharges Directly To An Antitrust Violator, None Of The Concerns Of *Illinois Brick* Apply

The indirect purchaser rule stems from concerns that do not apply when the plaintiff purchases overpriced goods or services directly from an antitrust violator. This Court has held that the major concern behind the indirect purchaser rule is that indirect purchasers are not in the "preferred position as private attorneys general" intended by Congress to enforce the antitrust laws. *Illinois Brick*, 431 U.S. at 746. If every

indirect purchaser could sue for its damages, then no plaintiff would be able to sue for the full amount of the antitrust damages flowing from the unlawful conduct. By cutting off the rights of indirect purchasers, *Illinois Brick* ensures that direct purchasers have incentive to sue so that the antitrust laws are vigorously enforced.[10]

This conclusion flowed from two other concerns. First, allowing every person along a chain of distribution to claim damages arising from a single violation of the antitrust laws would create a risk of duplicative recovery that Congress did not intend. *Id.* at 730. Because direct purchasers generally absorb most of the overcharges, *they are more likely to come forward to collect their damages*. *Id.* at 746-47. [11]Second, this Court chose to avoid increasing the cost and burden of antitrust actions with complicated damages theories necessitating massive evidence to determine how the overcharge was apportioned throughout the distribution chain. *Id.* at 731-32, 745.

As several lower courts have found since *Illinois*

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[10] [W]e conclude that the legislative purpose in creating a group of "private attorneys general" to enforce the antitrust laws under § 4 is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed a part of it. (*Id.* at 745-76, *quoting Standard Oil*, 405 U.S. at 262.)

[11] Encouraging direct purchasers to actually sue for damages was one of the key antitrust policy goals this Court sought to promote in *Illinois Brick*: "The combination of increasing the costs and diffusing the benefits of bringing a treble-damages action could seriously impair this important weapon of antitrust enforcement." *Illinois Brick*, 431 U.S. at 745.

Brick, these concerns are not present when a plaintiff purchases overpriced goods or services directly from an antitrust violator.[12] When a plaintiff purchases supracompetitively-priced goods or services directly from an antitrust violator, the plaintiff suffers most or all of the overcharge. Such a plaintiff-consumer therefore is precisely the preferred private attorney general intended by Congress to enforce the antitrust laws. *See Illinois Brick*, 431 U.S. at 746; *see also Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979) (reaffirming"[t]hat consumers of retail goods and services have standing to sue under § 4 . . .").

Likewise, when a plaintiff purchases overpriced goods or services directly from an antitrust violator, there is no risk of duplicative recovery since no other plaintiff has suffered the same direct overcharges. *See, e.g., Shamrock Foods*, 729 F.2d at 1213 (when antitrust violator is the seller, there is no "risk of duplicative recovery by various members of the distribution chain for the same alleged overcharge," which is the duplicative recovery of concern in *Illinois Brick).* Finally, when plaintiffs purchase directly from an antitrust violator, there is no difficulty in computing what percentage of the damage has been passed on through various levels of the distribution chain. Simply put, there is *no* distribution chain and no passing on of damages.

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[12] *See In re Brand Name Prescription Drugs*, 123 F.3d at 603 ("any indirect-purchaser defense would go by the board [if] the pharmacies [were] direct purchasers from the conspirators"); *Fontana Aviation*, 617 F.2d at 481; *Shamrock Foods*, 729 F.2d at 1212-13; *In re Mid-Atlantic Toyota Antitrust Litig.*, 516 F. Supp. 1287, 1295 (D. Md. 1981).

Accordingly, the court of appeals erred in applying the indirect purchaser rule of *Illinois Brick* to plaintiffs' claims against Ticketmaster. Because the plaintiffs paid a monopoly overcharge directly to the antitrust violator, Ticketmaster, plaintiffs have paid the full amount of the alleged overcharge. Thus, there is no possibility of duplicative recovery since no one else has suffered the same damages as the plaintiffs. Nor is there any difficulty in calculating damages along any chain of distribution. As the Ninth Circuit has noted in a similar context:

> While such a calculation would appear to be a simple one, even if it is complex it would not be the type of complexity that the *Illinois Brick* Court was concerned with.[13]

Calculating the damages when plaintiffs have paid the full antitrust overcharge is neither difficult nor within the scope of the concerns enunciated in *Illinois Brick*.

Indeed, the court of appeals here has turned *Illinois Brick* on its head. While *Illinois Brick* was calculated to ensure that the direct purchaser has the proper incentive to enforce the antitrust laws, as the dissent noted the court's decision here ensures only that:

> no one can bring a Section 4 suit against Ticketmaster in [the eighth] circuit. The plaintiffs in this appeal (and other similarly situated "indirect purchasers") are the only

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[13] *Shamrock Foods*, 729 F.2d at 1214, *quoting In re Mid-Atlantic Toyota*, 516 F. Supp. at 1295.

> parties who are actually injured by Ticketmaster's alleged illegal price-fixing, if any. The venues themselves, the parties whom the court seems to favor as candidates for bringing this Section 4 suit, are not injured, and therefore cannot bring an action at all. (Apdx. A at 23.)

In short, the indirect purchaser rule has no application when the plaintiffs purchase overpriced goods or services directly from an alleged antitrust violator. As the Eighth, Third,[14] and Fifth[15] circuits hold otherwise, this Court should grant certiorari here to make clear that the Seventh and Ninth circuits are correct that *Illinois Brick* cannot bar suit by plaintiffs who pay antitrust overcharges directly to an antitrust violator.

III. *ILLINOIS BRICK* DOES NOT REQUIRE THAT AN ANTITRUST PLAINTIFF NAME EVERY CO-CONSPIRATOR AS A DEFENDANT

The court of appeals held that:

> In this circuit, an antitrust plaintiff cannot avoid the *Illinois Brick* rule by characterizing a direct purchaser as a party to the antitrust violation, unless the direct purchaser is joined as a defendant. (Apdx. A at 13, n.4.)

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14 *Link*, 788 F.2d at 933.
15 *In re Beef Indus.*, 600 F.2d at 1163.

The law is the same in the Third and Fifth Circuits.[16] Plaintiffs submit that the Seventh and Ninth Circuits have adopted the correct position: A plaintiff need *not* name all the alleged co-conspirators in order to maintain suit as long as the plaintiff purchased overpriced goods or services directly from the alleged wrongdoer.[17]

This case therefore presents this Court with the opportunity to resolve this split among the circuits, and prevent nationwide antitrust conspiracies from going unremedied.

A. This Court Has Previously Held That Antitrust Conspirators Are Jointly And Severally Liable

From the outset of this Court's antitrust jurisprudence, the private antitrust action was viewed as a tort action, and the damages were viewed as a tort remedy. *See, e.g., Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U.S. 390, 397 (1906). Accordingly, liability amongst antitrust conspirators has always been joint and several. *See Texas Indus.*, 451 U.S. at 630.

The policy behind holding co-conspirators and other joint-tortfeasors jointly and severally liable is clear:

> [J]oint and several liability simply ensures

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[16] *See Link*, 788 F.2d at 933; *In re Beef Indus.*, 600 F.2d at 1163.

[17] *See Fontana Aviation*, 617 F.2d at 481; *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982); *accord Shamrock Foods*, 729 F.2d at 1214; *but see In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 691 F.2d 1335, 1342 (9th Cir. 1982), *cert. denied*, 464 U.S. 1068 (1984).

> that the plaintiffs will be able to recover the full amount of damages from some, if not all, participants. (*Id.* at 646.)

Indeed, the court of appeals' focus on the remote possibility that Ticketmaster could be sued by the venues is unwarranted, since:

> the Sherman Act and the provision for treble-damages actions under the Clayton Act were not adopted for the benefit of the participants in a conspiracy to restrain trade.... The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers. (*Id.* at 639.)

The rationale of joint and several liability applies with full force to the situation in this case. Plaintiffs have purchased supracompetively-priced services directly from an antitrust violator, and have borne the full brunt of the unlawful overcharge. Accordingly, the defendant-antitrust violator should not avoid liability merely because some other defendant may share some of the culpability.

B. Requiring A Plaintiff To Name All The Co-Conspirators Will Insulate Many Nationwide Antitrust Conspirators From Liability

Forcing the plaintiffs in a case such as this to name *all* the conspirators would create more than mere manageability problems. Rather, because no court in the country would have jurisdiction or venue over all the co-conspirators, the

rule enunciated by the Eighth Circuit has the effect of insulating Ticketmaster from liability for damages.

Section 12 of the Clayton Act is the Act's venue provision, and provides that:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business. . . . (15 U.S.C. § 22.)

Even though this Court has made clear that § 12 venue must be read broadly, the defendant must still be "doing or carrying on business 'of any substantial character'" in a particular forum in order to be haled into court in that forum. *United States v. Scophony Corp. of America*, 333 U.S. 795, 807 (1948).

A quick look at the nature of the conspiracy alleged here demonstrates the flaw in the court of appeals' requirement that plaintiffs name all the co-conspirators. Many if not all of the venues who profit from Ticketmaster's kickbacks only "transact business" in a single state. For example, the Tacoma Dome likely transacts business largely in the State of Washington, and the Saratoga Performing Arts Center likely transacts business mainly within the State of New York. Accordingly, a New York Court would not be a proper venue for an action against the Tacoma Dome, and a Washington Court would not be a proper venue for an action against the Saratoga Performing Arts Center. As any one

venue would be inappropriate for the bulk of the co-conspirators that profited from Ticketmaster's monopoly, under the court of appeals' logic, no § 4 claim could be brought against Ticketmaster anywhere.

The decisions in the Eighth, Fifth and Third Circuits therefore create a gaping loophole in antitrust law enforcement for nationwide antitrust conspiracies involving many local participants. This exception – which is *not* created by *Illinois Brick* – would completely frustrate private enforcement of the antitrust laws and encourage violations. Such an effect is utterly at odds with this Court's antitrust jurisprudence, which has stressed the importance of private enforcement actions under the antitrust laws. *See, e.g., Reiter*, 442 U.S. at 344; *Brunswick Corp.*, 429 U.S. at 485; *Standard Oil*, 405 U.S. at 262.

CONCLUSION

The Eighth Circuit's erroneous "antecedent transaction" rule creates an impossible standard for direct purchasers and threatens the "longstanding policy of encouraging vigorous private enforcement of the antitrust laws." *Illinois Brick*, 431 U.S. at 745. The treble damages action is a paramount tool of antitrust law enforcement and without it anticompetitive conduct such as that engaged in by Ticketmaster and other antitrust violators will go undeterred and unpunished.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 96-2883

ALEX CAMPOS; DANIA CAMPOS; ALBERT ALFONSO, Individually and on behalf of all others similarly situated; Plaintiffs/Appellants, v. TICKETMASTER CORPORATION; Defendant/Appellee.	*	Appeals from the United States District Court for the Eastern District of Missouri.
STEPHEN HINES; DIRK SCHNABLE; TODD VICSIK; JAMIE	*	

SALTZMAN; MIKE ELLIS; BRAD CHESKES; SUZANNE CRAWFORD, on behalf of themselves and on behalf of a class of persons similarly situated;

Plaintiffs/Appellants,

v.

TICKETMASTER CORPORATION;

Defendant/Appellee.

JOSEPH CROWLEY, Individually and on behalf of all others similarly situated;

Plaintiff/Appellant;

v.

TICKETMASTER CORPORATION;

Defendant/Appellee;

_____	*
	*
TONY STEPHENS,	*
Individually and on behalf	*
of all others similarly	*
situated;	*
Plaintiff/Appellant;	*
	*
v.	*
	*
TICKETMASTER	*
CORPORATION;	*
Defendant/Appellee;	*
	*
	*
_____	*
	*
EBON PETTY; ARLEAN	*
AZZO; JOHN AZZO;	*
SCOTT HENRY	*
BUETTNER; SCOTT J.	*
FREEDLAND; BRIAN	*
HOMER; ROGER	*
HUTTON; GARRETT	*
PFETZING;	*
CHRISTOPHER W.	*
QUINN; THOMAS	*
ROCKOV; JAMES	*
STEWART; HILARY	*

TOMPKINS, on behalf of *
themselves and others, in a *
class to be certified; *
Plaintiffs/Appellants, *
*
v. *
*
TICKETMASTER *
CORPORATION; *
Defendant/Appellee *
*

Submitted: February 14, 1997
Filed: April 10, 1998

Before HANSEN and MORRIS SHEPPARD ARNOLD, Circuit Judges, and MELLOY,[1] Chief District Judge.

MELLOY, Chief District Judge.

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[1]The Honorable Michael J. Melloy, Chief Judge, United States District Court for the Northern District of Iowa, sitting by designation.

The plaintiffs, individually and as a proposed class of popular music fans, sued Ticketmaster Corporation ("Ticketmaster") for damages and injunctive relief. Sixteen cases, originally filed in various districts, were consolidated for pretrial proceedings in the Eastern District of Missouri. Eleven of the cases were dismissed. The plaintiffs in the remaining five cases then filed a consolidated complaint superseding the individual complaints. The consolidated complaint alleged that Ticketmaster violated § 1 of the Sherman Act by engaging in price fixing with various concert venues and promoters and by boycotting the band Pearl Jam; that Ticketmaster violated § 2 of the Sherman Act by monopolizing, or attempting to monopolize, the market for ticket distribution services; and that Ticketmaster violated § 7 of the Clayton Act by acquiring its competitors. See 15 U.S.C. § 1 *et seq.* The plaintiffs claimed standing to sue based on their payment of monopoly overcharges, in the form of service and handling fees, for Ticketmaster's ticket distribution services.

The district court dismissed the suit, holding that the plaintiffs lacked standing to sue because they were indirect purchasers within the meaning of Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) and its progeny. The district court also held that, even if the plaintiffs were not indirect purchasers, they were nevertheless inappropriate plaintiffs under the standards set forth by the Supreme Court in Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983). Finally, the

district court held that three of the consolidated cases had been improperly venued, and dismissed the cases originally filed in Georgia, Washington, and Michigan.

The plaintiffs contend that the court erred in all of these holdings. We affirm in part, reverse in part, and remand for further proceedings.

I.

Since the case was dismissed on the pleadings, we treat all factual allegations of the complaint as true. See Haberthur v. City of Raymore, 119 F.3d 720 (8th Cir. 1997). We may affirm a dismissal on the pleadings "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); see also Associated GeneralContractors, 459 U.S. at 526 ("[W]e must assume that the [plaintiff] can prove the facts alleged in its amended complaint.").

According to the complaint, Ticketmaster is a monopoly supplier of ticket distribution or ticket delivery services to large-scale popular music shows. The complaint alleges that Ticketmaster has long-term exclusive contracts with almost every promoter of concerts in the United States. These exclusive contracts ensure that Ticketmaster will have the right to handle the vast majority of ticket sales for almost every large-scale popular music concert in the United States, regardless of whether or not Ticketmaster has exclusive contracts with the particular venues where those concerts are

held.

Ticketmaster's exclusive contracts with almost every promoter of concerts in the United States give it the right to distribute tickets over the telephone, at outlets such as retail stores, and at the venue where the promoter is presenting an event. According to plaintiffs, Ticketmaster therefore has ironclad control over ticketing for any large-scale popular music concert at major venues in the United States.

Ticketmaster uses that control, according to the complaint, to extract from the plaintiffs supracompetitive fees for ticket distribution services. Those fees can be as high as twenty dollars per ticket. By paying those fees, the plaintiffs contend that they suffer injury to their property within the meaning of Section 4 of the Clayton Act, 15 U.S.C. § 15, and so have standing to sue. See Reiter v. Sonotone Corp., 442 U.S. 330 (1979). The district court, while not questioning the allegation that the plaintiffs pay some increased price for concert tickets as a result of Ticketmaster's monopoly,nonetheless held that such injury did not give the plaintiffs standing under § 4.

II.

In Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), the Supreme Court held that only the "direct purchaser" from a monopoly supplier could sue for treble damages under § 4 of the Clayton Act. See 15 U.S.C. § 15; Hovenkamp, The Indirect-Purchaser Rule and Cost-Plus Sales, 103 Harv. L.

Rev. 1717 (1990). "Indirect purchasers" generally lack standing under the antitrust laws and so cannot bring suits for damages. See Sports Racing Services, Inc. v. Sports Car Club of America, Inc., 131 F.3d 874,883 (10th Cir. 1997)("The Supreme Court has consistently held that only direct purchasers suffer injury within the meaning of § 4 of the Clayton Act.").

The Supreme Court has defined an indirect purchaser as one who is not the "immediate buyer from the alleged antitrust violator[]," Kansas v. Utilicorp United, Inc., 497 U.S. 199, 207 (1990), or one who "[does] not purchase [the monopolized product] directly from the [antitrust] defendant[.]" California v. ARC America Corp., 490 U.S. 93, 96 (1989). Some commentators have offered definitions of their own. See, e.g., Werden & Schwartz, Illinois Brick and the Deterrence of Antitrust Violations — An Economic Analysis, 35 Hastings L.J. 629, 668 n. 4 (1984)("The term 'indirect purchaser'... means any party that purchases a product from any party in the vertical supply chain other than the party suspected of the antitrust violation, *i.e.*, from a direct purchaser or another indirect purchaser -- with the ultimate consumer being the last indirect purchaser."); Hovenkamp, The Indirect-Purchaser Rule and Cost-Plus Sales, 103 Harv.L.Rev. 1717 (1990)("'Indirect' purchaser[s] [are] those who bought an illegally monopolized or cartelized product or service through the agency of a dealer, distributor, or some other independent reseller who was not a participant in the antitrust violation."). Other courts and commentators have

given examples to explain the content of the indirect purchaser concept. See, e.g., McCarthy v. Recordex Service, Inc., 80 F.3d 842, 852 n. 16 (3rd Cir.)(homeowner an indirect purchaser of paint used by housepainter), *cert. denied*, 117 S.Ct. 86 (1996); Landes & Posner, Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule in Illinois Brick, 46 U.Chi.L.Rev. 602 (1979)(bread buyer an indirect purchaser of flour and oven used by bread baker).[2]

A common concept unites these various definitions and examples: An indirect purchaser is one who bears some portion of a monopoly overcharge only by virtue of an antecedent transaction between the monopolist and another, independent purchaser. Such indirect purchasers may not sue to recover damages for the portion of the overcharge they bear. The right to sue for damages rests with the direct purchasers, who participate in the antecedent transaction with the monopolist.

Some review of the economic assumptions underlying the direct purchaser rule is necessary to understand the

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[2]Although direct purchaser issues usually involve a chain of distribution in which a tangible good passes from one purchaser to another, that is not always so. An indirect purchaser can bear some part of the monopoly overcharge for a product even when that product does not pass from the direct to the indirect purchaser. For example, in Landes and Posner's example of the bread buyer, the bread buyer pays a higher price for bread because the baker passes along some part of the monopoly overcharge paid for the oven.

justification for the direct purchaser rule. For purposes of antitrust analysis, courts assume that a firm generally wishes to "minimize its input costs[.]" Olympia Equipment Leasing Co. v. Western Union Telegraph Co., 797 F.2d 370, 374 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987); Stamatakis Industries, Inc. v. King, 965 F.2d 469, 472 (7th Cir. 1992). Consequently, when a firm buys its inputs from a monopolist at a monopoly price, we may be fairly certain that it had little choice in the matter.[3] The indirect purchaser, in turn, pays some portion of the monopoly overcharge only because the previous purchaser was unable to avoid that overcharge. The homeowner in the example given by the Third Circuit pays some part of the monopoly overcharge for paint only because the housepainter was unable to obtain his paint at a competitive price, just as the bread buyer in Landes and Posner's example pays some part of the monopoly overcharge for the oven only because the baker was unable to obtain a competitively priced oven. The breakdown in competitive conditions occurs in transactions at least once removed from the indirect purchaser.

The monopoly overcharge exacted by the monopolist generally injures both those who deal directly and those who

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[3]The situation may be different when the firm is party to the antitrust violation. Cf. In re Midwest Milk Monopolization Litigation, 730 F.2d 528, 529 - 30 (8th Cir. 1984), *cert. denied*, 469 U.S. 924 (1984); In re Beef Industry Antitrust Litigation, 600 F.2d 1148, 1163 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980); McCarthy, 80 F.3d at 854.

deal derivatively with the monopolist. As Judge Posner has explained, "The optimal adjustment by an unregulated firm to the increased cost of the input [*i.e.*, the monopoly overcharge] will always be a price increase smaller than the increase in input cost[.]" State of Illinois *ex rel.* Hartigan v. Panhandle Eastern Pipe Line Co., 852 F.2d 891, 894 (7th Cir. 1988)(*en banc*), *cert. denied*, 488 U.S. 986 (1988), *overruled on other grounds by* Illinois v. Panhandle Eastern Pipe Line Co., 935 F.2d 1469 (7th Cir. 1991); Stamatakis, 965 F.2d at 472. Only rarely will a firm be able to pass on the entire amount of a monopoly overcharge to its customers. See Panhandle Eastern, supra. In the usual case, both the firm and its customers will bear some portion of the overcharge, and thus both will suffer injury from the antitrust violation. See Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 489 - 93 (1968); Illinois Brick, 431 U.S. at 731 - 33.

Precisely what part of the overcharge will be borne by the direct purchaser, and what part will be borne by the indirect purchaser, is "an example of what is called 'incidence analysis,' and is famously difficult." In re Brand Name Prescription Drugs Litigation, 123 F.3d 599, 605 (7th Cir. 1997), *cert. denied*, 118 S.Ct. 1178 (1998); see also Illinois Brick, 431 U.S. at 740 - 44; Utilicorp United, Inc., 497 U.S. at 206 - 209; Landes & Posner, Economic Analysis of Illinois Brick, 46 U.Chi.L.Rev. at 619 - 20. If both direct and indirect purchasers were allowed to sue for damages, the courts would be faced with the "famously difficult" task of apportioning the payment of overcharges between direct and indirect

purchasers. The alternative is to allow duplicative recovery, which the Supreme Court also disapproves of and the avoidance of which constitutes another rationale for the direct purchaser rule. See Utilicorp United, 497 U.S. at 212; Southwestern Bell Telephone Co. v. FCC, 116 F.3d 593, 597 (D.C.Cir. 1997).

The Supreme Court has declined to involve the federal courts in such an analysis, except in very limited circumstances, explaining that "[t]he direct purchaser rule serves, in part, to eliminate the complications of apportioning overcharges between direct and indirect purchasers." Utilicorp United, 497 U.S. at 208; see also In re Brand Name Prescription Drugs Litigation, 123 F.3d at 605; In re Midwest Milk MonopolizationLitigation, 730 F.2d at 530. While the Supreme Court has recognized that the "economic assumptions underlying the Illinois Brick rule might be disproved in a specific case," 497 U.S. at 217, the Court also has made it plain that it considers it an "unwarranted and counterproductive enterprise to litigate a series of exceptions." 497 U.S. at 217.

None of the limited circumstances that might warrant avoidance of the direct purchaser rule exist here. There is no "cost-plus" contract, see Hanover Shoe, 392 U.S. at 494, no allegation that the indirect purchasers own or control the direct purchasers, see In re Brand Name Prescription Drugs Litigation, 123 F.3d at 605, and no proper allegation that the direct purchasers have conspired with or otherwise been party

with Ticketmaster to any antitrust violation.[4] Since the direct purchaser rule applies in this case, the question becomes whether the plaintiffs are direct or indirect purchasers of Ticketmaster's services. III.

The plaintiffs contend that they are direct purchasers of "ticket distribution services" from Ticketmaster, primarily because they pay directly to Ticketmaster distinct service and convenience fees. However, like the Third Circuit, we do not find billing practices to be determinative of indirect purchaser status. See McCarthy, 80 F.3d at 853 n. 18 (noting that "even if a separate charge for gasoline were assessed [to a taxi passenger], the taxi passenger still could not be considered a direct purchaser [of gasoline] in any sense."). As the

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[4] The plaintiffs do characterize the venues as beneficiaries of and participants in Ticketmaster's unlawful activity, but the plaintiffs have not joined the venues as defendants. In this circuit, an antitrust plaintiff cannot avoid the Illinois Brick rule by characterizing a direct purchaser as a party to the antitrust violation, unless the direct purchaser is joined as a defendant. See In re Midwest Milk Monopolization Litigation, 730 F.2d at 529 - 31. These consolidated cases are controlled by the law of this circuit, rather than that of the various circuits in which they were first filed. See Temporomandibular Joint (TMJ) Implant Recipients v. E.I. DuPont de Nemours & Co., 97 F.3d 1050, 1055 (8th Cir. 1996)("When analyzing questions of federal law, the transferee court should apply the law of the circuit in which it is located."); see also In re Korean Air Lines Disaster, 829 F.2d 1171 (D.C.Cir. 1987), *aff'd sub nom* Chan v. Korean Air Lines, Ltd., 490 U.S. 122 (1989); but see Cooper, The Korean Air Disaster: Choice of Law in Federal Multidistrict Litigation, 57 Geo.Wash.L.Rev. 1145 (1989).

plaintiffs' complaint makes clear, Ticketmaster's exclusive contracts with almost every promoter of concerts in the United States require venues wishing to host concerts to use Ticketmaster for ticket distribution to those concerts. Just like the housepainter and the baker, the complaint alleges that the venues are unable to obtain a necessary input — ticket delivery services — in a competitive market. The plaintiffs' inability to obtain ticket delivery services in a competitive market is simply the consequence of the antecedent inability of venues to do so. Cf. *Note*, Beyond Economic Theory: A Model for Analyzing the Antitrust Implications of Exclusive Dealing Arrangements, 45 Duke L.J. 1009,1015 (1996)("Ticketing service companies do not compete directly for consumers' business. Instead, [those companies] compete to secure contracts with venues and event promoters for the right to sell tickets to various entertainment events."). As the plaintiff's complaint makes clear, ticket buyers only buy Ticketmaster's services because concert venues have been required to buy those services first. As we explained above, such derivative dealing is the essence of indirect purchaser status, and it constitutes a bar under the antitrust laws to the plaintiffs' suit for damages. Nor do we agree with the plaintiffs' contention that Ticketmaster's monopoly power is benign, so far as the venues are concerned, simply because Ticketmaster's service fees are collected immediately from ticket buyers. Although the plaintiffs describe these fees as separate from what they call the actual purchase price of concert tickets, it appears clear that the actual purchase price

and the cost of the service fees amount to the single cost of attending the concert, regardless of how that cost is divided into actual purchase price and service fees. See Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 495 (1992)(Scalia, J., dissenting).[5] Since the price of the ticket (that is, the actual purchase price plus the service fees) is obviously a price that the market will bear, see U.S. Football League v. National Football League, 842 F.2d 1335, 1357 - 58 n. 19 (2nd Cir. 1988), a venue free from Ticketmaster's domination of ticket distribution would be able to charge that price itself, without having to cede to Ticketmaster a portion of that price in the form of supracompetitive service fees. Cf. Hanover Shoe, 392 U.S. at 492 (noting, in the course of disapproving a passing-on defense to antitrust suits, the "nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued."); Utilicorp United, 497 U.S. at 209 (same).

Consequently, we affirm the district court's order dismissing the individual plaintiff's claims for monetary damages under § 4 of the Clayton Act.

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[5] We note that, unlike in the Eastman Kodak case, there are no information costs here that may prevent the plaintiffs from separating out from the total purchase price the actual purchase price and service fee components. See Eastman Kodak, 504 U.S. at 473 - 74.

IV.

Indirect purchaser status does not bar the plaintiffs from seeking injunctive relief under § 16 of the Clayton Act. The concerns of the direct purchaser rule have mainly to do with the complexities of incidence analysis, complexities that do not arise when the courts must consider the propriety of injunctive relief. As Professors Areeda and Hovenkamp explain, "An equity suit neither threatens duplicative recoveries nor requires complex tracing through the distribution chain. There are no damages to be traced, and a defendant can comply with several identical injunctions as readily as with one. Illinois Brick has not therefore barred an indirect purchaser's suit for an injunction." Phillip E. Areeda and Herbert Hovenkamp, Antitrust Law ¶371d, at 259 (1995); see also McCarthy, 80 F.3d at 856 (holding that "plaintiffs need not satisfy Illinois Brick's "direct purchaser" requirement in order to seek injunctive relief[.]").

The case relied on by Ticketmaster as support for its contention that injunctive relief is unavailable to the plaintiffs, Cargill, Inc. v. Monfort of Colorado, 479 U.S. 104 (1986), does not apply to the facts of this case. The Court denied standing to seek injunctive relief to the plaintiff in Cargill because the injury alleged by the plaintiff was nothing more than a reduction in profit resulting from increased competition. See 479 U.S. at 114 - 15 ("Monfort's [] claim is that ... Excel would lower its prices to some level at or slightly above its costs in order to compete with other packers

for market share....To remain competitive, Monfort would have to lower its prices; as a result, Monfort would suffer a loss in profitability[.]"). The Cargill decision reflects the principle that antitrust law provides no remedies for those injured by competition; it does not, as Ticktemaster contends, establish an inflexible rule that no antitrust plaintiffmay seek injunctive relief unless he may also seek damages. In fact, footnote six of the Cargill decision explains the different standing requirements under § 16 and § 4 of the Clayton Act, cites to Illinois Brick, and concludes that a party who lacks standing under § 4 may still have standing to seek injunctive relief under § 16. See 479 U.S. at 111 n. 6.

In this case, the pleadings establish anti-trust standing to seek injunctive relief. All of the plaintiffs claim to have purchased tickets from Ticketmaster and claim to have paid the monopolistic service fees. The payment of those fees establishes standing to pursue a claim for injunctive relief.

V.

Finally, the plaintiffs appeal the portion of the district court's order that found that Ticketmaster was not transacting business in Georgia, Washington, or Michigan within the meaning of § 12 of the Clayton Act, the Act's venue provision. See 15 U.S.C. § 22; U.S. ex rel. Thistlethwaite v. Dowty Woodville Polymer, Ltd., 110 F.3d 861, 865 (2nd Cir. 1997). Relying on O.S.C. Corp. v. Toshiba America, 491 F.2d 1064 (9th Cir. 1974) and San Antonio Tel. Co. v.

American Tel. & Tel. Co., 499 F.2d 349 (5th Cir. 1974), the district court held that Ticketmaster was not transacting business within those judicial districts because it did not exercise "day to day" control over the operations of its subsidiaries located in those districts. We conclude that the district court applied the wrong legal standard for venue under the Clayton Act.

Section 12 of the Clayton Act provides in pertinent part that "[a]ny suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business[.]" 15 U.S.C. § 22. In U.S. v. Scophony Corp. of America, 333 U.S. 795 (1948), the Supreme Court held that the "transacts business" language of § 12 was intended to make "[t]he practical, everyday business or commercial concept of doing or carrying on business 'of any substantial character' [] the test of venue." 333 U.S. at 807. The "highly technical distinctions" that had characterized venue determinations under the previous venue provision, § 7 of the Sherman Act, were to be "sloughed off" by the "practical and broader business conception" embodied in § 12. 333 U.S. at 807; Reynolds Metal Co. v. Columbia Gas System, Inc., 669 F. Supp. 744, 747 (E.D.Va. 1987)("[T]he 'transacts business' language of the Clayton Act enlarged the more limited 'found' standard of the Sherman Act.").

When venue is asserted over a parent corporation on the

basis of a subsidiary's business activities, the question is whether the parent "exercise[s] sufficient control over its [] subsidiary to cause the parent to 'transact business' [in the judicial district] within the special venue provision of the Clayton Act." Tiger Trash v. Browning-Ferris Industries, Inc., 560 F.2d 818, 822 (7th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978). Sufficient control over the operations of a subsidiary renders the subsidiary the instrument, rather than merely the investment, of the parent, and supports the conclusion that the parent is transacting business in a district, despite the formal separation of corporate entities. See Lakota Girl Scout Council, Inc. v. Harvey Fund-Raising Management, Inc., 519 F.2d 634, 637 (8th Cir. 1975). Sufficient control does not require that the subsidiary be controlled to an ultimate degree by its parent, 560 F.2d at 824, although something more than mere passive investment by the parent is required. 560 F.2d at 823; see also Phone Directories Co., Inc. v. Contel Corp., 786 F. Supp. 930, 939 (D. Utah 1992); Reynolds, 669 F. Supp. at 749. The parent must have and exercise control and direction, 560 F.2d at 823, over the affairs of its subsidiary in order for venue to be proper under § 12.

Day-to-day control of the activities of the subsidiary is not required in order for a parent to be carrying on business of any substantial character within a judicial district. Scophony, 333 U.S. at 807. It is enough if the parent exercises continuing supervision of and intervention in the subsidiaries' affairs, see Chrysler Corp. v. General Motors Corp., 589 F. Supp. 1182,

1200 (D.D.C. 1984), especially if the parent exercises its "ability ... to influence major decisions of the subsidiary which lead or could lead to violations of the antitrust laws." Grappone, Inc. v. Subaru of America, Inc., 403 F. Supp. 123, 131 (D.N.H. 1975); Scophony, 333 U.S. at 814 (holding that venue was proper for British corporation in Southern District of New York when British corporation demonstrated a "continuing exercise of supervision over and intervention in [American subsidiary's] affairs.").

In reaching the conclusion that Ticketmaster was not transacting business in Georgia, Washington, or Michigan, the district court relied on the affidavit of Ned Goldstein, Senior Vice President and General Counsel of Ticketmaster, who affirmed that Ticketmaster owns no property and has no bank accounts or offices in Georgia, Washington, or Michigan. Goldstein further affirmed that all the day-to-day operations of the subsidiaries were under the control of the officers of those subsidiaries. While these affirmations may have been enough to resolve the venue issue under the standard applied by the district court, they do not resolve the question under the standard we have explained here. Accordingly, we vacate the district court's venue ruling so that the district court may allow further discovery on the venue issue, as may be appropriate, and reconsider the issue under the appropriate standard.

VI.

In conclusion, we affirm the district court's judgment that the plaintiffs lack standing to pursue their claims for damages under § 4 of the Clayton Act. We reverse the district court's ruling that the plaintiffs lack standing to seek injunctive relief under § 16, and we vacate and remand for further proceedings on the issue of proper venue.

MORRIS SHEPPARD ARNOLD, Circuit Judge, dissenting.

The court holds that *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), precludes these plaintiffs from bringing an antitrust action against Ticketmaster under Section 4 of the Clayton Act, *see* 15 U.S.C. § 15(a) . I respectfully disagree.

The court begins its opinion by attempting to clarify the meaning of the phrase "indirect purchaser" in the antitrust context. Citing *Illinois Brick* itself, numerous other cases, and several law review articles, the court concludes that "[a]n indirect purchaser is one who bears some portion of a monopoly overcharge only by virtue of an antecedent transaction between the monopolist and [a direct purchaser]." The phrase "antecedent transaction," however, appears nowhere in the authorities relied on, and, in fact, a mere "antecedent transaction" will not turn all purchasers of a monopolized product into indirect purchasers for the purposes of *Illinois Brick*.

Illinois Brick, 431 U.S. at 727, uses the term "indirect

purchaser" to mean someone in a vertical supply chain who purchases a monopolized product from someone other than a monopolist. Both the direct and the indirect purchaser will usually suffer some injury as both ordinarily will have to absorb a portion of the monopolist's overcharge. *See id.* at 746. Because the Supreme Court in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968), had rejected the argument that monopolists could avoid liability to direct purchasers to the extent that those direct purchasers had "passed on" any or all of their markups to indirect purchasers, without *Illinois Brick*, both direct and indirect purchasers would have standing to sue for the same antitrust injury. *Illinois Brick*, 431 U.S. at 746, in the interests of economic and administrative efficiency, holds that only parties who are directly injured may sue for antitrust violations, thus avoiding the need to apportion damages among direct and indirect purchasers, and preventing double recovery (or sextuple recovery under Section 4 of the Clayton Act) when both indirect and direct purchasers sue.

Thus *Illinois Brick* requires more than a mere antecedent transaction for an antitrust defendant to avoid suit from an "indirect purchaser" under Section 4. Instead, the antecedent transaction must have been one in a direct vertical chain of transactions and it must have resulted in the "passing on" of monopoly costs from the direct purchaser to the indirect purchaser. *Illinois Brick*, 431 U.S. at 746. In this case, neither of these conditions is met.

The monopoly product at issue in this case is ticket

distribution services, not tickets. Ticketmaster supplies the product directly to concert-goers; it does not supply it first to venue operators who in turn supply it to concert-goers. It is immaterial that Ticketmaster would not be supplying the service but for its antecedent agreement with the venues. But it is quite relevant that the antecedent agreement was not one in which the venues bought some product from Ticketmaster in order to resell it to concert-goers. More important, and more telling, is the fact that the entirety of the monopoly overcharge, if any, is borne by concert-goers. In contrast to the situations described in *Illinois Brick* and the literature that the court cites, the venues do not pay any portion of the alleged monopoly overcharge -- in fact, they receive a portion of that overcharge from Ticketmaster.

An unhappy result of the holding in this case is that it is now likely that no one can bring a Section 4 suit against Ticketmaster in this circuit. The plaintiffs in this appeal (and other similarly situated "indirect purchasers") are the only parties who are actually injured by Ticketmaster's alleged illegal price-fixing, if any. The venues themselves, the parties whom the court seems to favor as candidates for bringing this Section 4 suit, are not injured, and therefore cannot bring an action at all.

For the reasons indicated, I dissent from the judgment in this case.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF MISSOURI

Memorandum and Order

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In Re: Ticketmaster Corporation Antitrust Litigation

MEMORANDUM AND ORDER

929 F.Supp. 1272

OPINION BY: Stephen N. Limbaugh, UNITED STATES DISTRICT JUDGE

OPINION:

This matter is before the Court on the Defendant's Motions to Dismiss and the Defendant's Motion for Sanctions. The case involves allegations of nationwide antitrust violations that caused the Plaintiffs to pay, individually and as a proposed class, supracompetitive prices for large-scale popular-music concert tickets.[1] The motions presented to the Court challenge the allegation for a failure to state a claim, a lack of jurisdiction and improper venue, and a challenge based on the law of the case doctrine.

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[1]The Department of Justice investigated the contracting practices of Ticketmaster and closed its investigation on July 5, 1995.

Procedural History

On December 19, 1994, the Judicial Panel on Multidistrict Litigation (Panel) transferred sixteen cases to this Court. As the suits arrived in St. Louis over the next several months, it became clear that each one of the cases involved similar antitrust allegations against Ticketmaster, its President Frederic D. Rosen, its operating subsidiaries, the Promoters who work with Ticketmaster, a number of venues, Ticketmaster outlets, or major league sports teams in a variety of sports. In each suit, the Plaintiff was a ticket purchaser or group of ticket purchasers who had bought tickets through Ticketmaster.

Because of the unwieldy nature of the suits, the Court sent out an Order in June of 1995 to determine which parties remained in the suits from the transferor courts and to compile a list of the counsel of record. Before an initial pretrial hearing in August, the Parties entered appearances and filed proposed scheduling orders. Those were reviewed by the Court and used to develop a scheduling plan and a counsel committee with local liaisons. By the end of August, the parties had filed a Consolidated Complaint that superseded the variety of complaints that had been filed by different lawyers around the country. After further refinement, a Second Amended Consolidated Complaint (the Complaint) was filed at the end of September.

When the Complaint was filed, the Court was left with

five cases and one Defendant. Eleven cases, Frederic D. Rosen, the promoters, venues, sports teams, and the operating agents of Ticketmaster had all been dismissed.

The Defendant attacks the Complaint with three separate motions to dismiss. The first motion addresses all pending cases, the second motion addresses three of the cases, and the last motion addresses only one case. After the matter was fully briefed, the Court granted the Parties' request for oral argument. Now that the Court has received the briefs, heard the oral argument, and received the post-argument filings, the motions are ripe for ruling.

Judicial Authority

Although none of the cases currently before the Court was originally filed in this district, this Court has jurisdiction as a result of the Panel's transfer order pursuant to 28 U.S.C. § 1407. When cases of similar factual and legal basis are filed in various jurisdictions, they are thoroughly reviewed by the Panel. If selected for consolidation, the Panel puts them in front of one court so that completion of pretrial proceedings may be handled efficiently. 28 US. C. § 1407(a). This procedure promotes economy of justice with quicker, less repetitive pre-trial proceedings. In Re: *Scotch Whiskey,* 299 *F. Supp.* 543 *(JPML* 1969). While consolidated, this Court has complete jurisdiction over the suits. Upon completion of the pretrial, this Court may remand the cases to their original

jurisdictions. In Re: *Flight Attendant,* 411 *F.* Supp. 795, 797 *(JPML* 1976).

Substantive Motions

I. Failure to State a Claim

The Court will begin its examination with the comprehensive motion that challenges all pending cases for failure to state a claim under Rule 12(b)(6) FED.R.CIV.P.

In passing on a motion to dismiss, the Court must view the facts alleged in the Complaint in the light most favorable to the Plaintiffs. *Scheuer v. Rhodes,* 416 U.S. 232, 94 S. Ct. 1683, 40 *L. Ed.* 2d 90 (1974); *Conley v. Gibson,* 355 U.S. 41, 45-46, *78 S. Ct.* 99, 2 *L. Ed.* 2d 80 (1957); Toombs v. *Bell,* 798 *F.2d 297,* 298 *(8th Cir.* 1986). The Court should not grant a motion to dismiss merely because the Complaint does not state with precision every element of the offense necessary for recovery. 5 Wright & Miller, Federal Practice and Procedure: civil, Sec. 1216 at 120 (1969). A complaint is sufficient if it contains "allegations from which an inference can be drawn that evidence on these material points will be introduced at trial." Id. at 122-123. Moreover, a court should not dismiss a complaint unless it "appears beyond a reasonable doubt that Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. " Conley *v. Gibson, supra,* 355 US. *at* 45-46.

The Court must view the Complaint in the light most favorable to the Plaintiffs and should not dismiss it merely because the Court doubts that the Plaintiffs will be able to prove all of the necessary allegations. *Bennett v. Berg, 685 F.2d* 1053, 1058 (8th Cir. 1982). Thus, a motion to dismiss is likely to be granted "only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief. " Fusco v. *Xerox Corp.,* 676 *F.2d* 332, 334 *(8th Cir.* 1982). With this standard in mind, the Court turns to an examination of the Plaintiffs' Complaint.

The five-count Complaint begins with an introduction that alleges the Defendant colluded with venues to impose monopoly prices, colluded with venues and promoters to boycott performers who resisted its monopoly power, and unlawfully acquired its competitors. The Plaintiffs outline their knowledge of Ticketmaster's operating procedures and propose a definition of the relevant market and market actors. The market description shows that a ticketing system for large-scale popular-music events exists because Ticketmaster approaches venues and contracts to handle their ticket sales. As a part of this contract, the venues receive a fee and Ticketmaster distributes the venues' tickets to the Plaintiffs. These contracts may span a number of years and may limit the venues' ability to hire performers who will not allow the venues to use Ticketmaster's distribution service. These background allegations are incorporated into each one of the

specific counts.

The first Count alleges a violation of Section 2 of the Sherman Act. It alleges that Ticketmaster attained and maintained monopoly power over the sale of tickets by acquiring long-term exclusive contracts with venue owners and concert promoters (86) and that the Plaintiffs have been forced to buy tickets from Ticketmaster at supracompetitive prices (88) which they pay directly to Ticketmaster. (94)

The second Count, which is also brought under Section 2 of the Sherman Act, alleges an attempt to monopolize. It alleges Ticketmaster and the venues have entered exclusive contracts that are designed to create the probability of eliminating competition in the market. (100) The resulting lack of competition has caused the Plaintiffs to pay supracompetitive prices. (102)

The third Count is brought under Section 1 of the Sherman Act and alleges price fixing. Again, Ticketmaster is alleged to have entered exclusive agreements with venues which allow it to operate its business as the monitor of a nationwide cartel of venues. (110)

The fourth Count, which is also brought under Section 1 of Sherman Act, alleges that Ticketmaster conspired with venues and concert promoters to boycott performers who want to reduce the total price of their tickets by forcing lower distribution service fees. (119) The alleged harm is that the Plaintiffs have not been able to enjoy these boycotted performers. (123)

The final Count alleges that Ticketmaster illegally acquired Ticketron, Pacer CATS, and other competitors. These illegal acquisitions have foreclosed entry into the market by competitors and slowed innovation in the industry.

The primary line of argument put forth by Ticketmaster to challenge the Complaint is that the Plaintiffs in this case lack standing because they cannot show sufficient direct link to the market to give them antitrust standing based on an antitrust damage.

Standing is a fundamental element of any suit. Before the Court can address the merits of the Plaintiffs' claims, it must find that the Plaintiffs have a legal right to bring those claims. Since it goes to the very power of the Court to act, standing must exist at all stages of the proceeding. *In re Martin, 64 Bankr. 638 (Bankr. 1986).*

The Supreme Court set out the basic doctrine for Article III standing in *Lujan v. Defenders of Wildlife, 504 U S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).*

> The irreducible constitutional minimum of standing contains three elements: First, the plaintiff must have suffered an 'injury in fact' -- an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) actual or imminent, not conjectural or hypothetical . . . Second, there must be a causal connection between the injury and the conduct complained of . . . Third, it must be likely, as

> opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. 504 U.S. at 560-561, 112 S. Ct. at 2136. Last year the Supreme Court reaffirmed those requirements. *United States v. Hays, U. S. , 115 S. Ct. 2431, 2435, 132 L. Ed. 2d 635 (1995).*

In this case, Article III standing is simply the threshold inquiry because the Plaintiffs must also show that they have antitrust standing. The expansive nature of the antitrust statutes is given practical meaning by this standing doctrine. The established test was developed in *Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983).* The Contractors test requires the Court to evaluate: (1) the causal connection between the alleged violation and the injury; (2) any improper motive; (3) if the nature of the injury was of a type that Congress sought to redress with the antitrust laws;[2] (4) the directness with which the alleged market restraint caused the injury; (5) the speculative nature of the damages; and (6) any risk of duplicative recovery or

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[2]Although the Sherman Act is often referred to as the Magna Carta of antitrust laws, the Court will not speculate whether the English barons envisioned their stand on the field of Runnymede in 1215 as one to protect the villagers from supracompetitive admission prices to see traveling minstrels.

complex apportionment of damages. If the Plaintiffs cannot meet this specific test, regardless of whether they meet the general requirements of standing, they do not have standing to bring this suit.

The Eighth Circuit has recognized that the antitrust injury element of the Contractors test is potentially dispositive in a standing analysis. *Lovett v. General Motors Corp., 975 F.2d 518, 520 (8th Cir. 1992).* The Plaintiffs contend that they suffered an antitrust injury because they pay more for their concert tickets than they would if Ticketmaster did not exercise monopoly power. That is not enough however, to qualify as an antitrust injury:

> A mere causal connection between an antitrust violation and harm to [Plaintiffs] cannot be the basis for antitrust compensation unless the injury is directly related to the harm the antitrust laws were designed to protect. The Plaintiffs must have been the target of the anticompetitive activity, not one who has merely suffered indirect, secondary, or remote injury.

Id. at 520.

If there is an injured party who is the target of Ticketmaster's alleged antitrust activity, it is the venue -- the "consumer" of Ticketmaster's ticket handling service.

The Plaintiffs have expertly drafted an elaborate

Complaint which details the contracting process between Ticketmaster and the venues. It is the Plaintiffs own allegations in the Complaint which show that they are not best suited to bring this claim against Ticketmaster. If a violation has occurred, the appropriate party is a venue or class of venues and promoters who are the ones who "consume" Ticketmaster's product; they are the ones who would suffer any direct loss if there is Supracompetitive pricing in the fee contracts due to Ticketmaster's alleged monopoly power.

Even if the antitrust injury prong is not dispositive, the Plaintiffs still lack standing because they also fail other elements of the Contractors test. If these Plaintiff had suffered an antitrust injury, they would lack standing because the damages would be speculative and the apportionment of those damages would present complex problems. Because there are many factors that combine to make the price of a ticket and regulate the purchasers' willingness to buy, the Court cannot accurately calculate the damages. Even if the Court could calculate the damages, it would be too difficult to identify the proper members of the Plaintiffs' proposed class. In addition to the task of tracking the credit card receipts for the time period in question, because the nature of the industry is such that many multiple-ticket orders are charged to one credit card, it would be nearly impossible to verify the identity of all the end purchasers of the individual tickets.

The Plaintiffs urge the Court to ignore the Contractors test and instead apply the analysis used by the Supreme Court in

Blue Shield of Virginia v. McCready, 457 U.S. 465, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982). In that case, an employee whose medical benefits plan did not allow for payment of psychologist fees was found to have antitrust standing to sue the insurer because her participation through the employer's plan was inextricably intertwined in the psychotherapy market. Because the factual situation of this case is one step removed from that scenario, the McCready analysis does not apply. If the Court were to analogize that factual situation to this case, the musical performers would be the psychologists and the venues and ticket purchasers would be inextricably intertwined. Ticketmaster would be more analogous to the receptionist who took Ms McCready's appointment than they would be to insurance provider Blue Shield.

In addition to that factual distinction, the decision in McCready made clear that case did not pose problems of duplicative recovery. Id. *457 U.S. at 474-475,102 S. Ct. at 2546.* This case however, like *Illinois Brick Co. v. Illinois, 431 US. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977),* does present a problem of multiple recovery. If these Plaintiffs were allowed to recover, they would merely be the first in a long line of venues and promoters who could also state a claim and make a recovery, thus transforming treble damages against Ticketmaster into an exponential award.

Because the Court finds that the Plaintiffs do not have antitrust standing, their cases are dismissed. The Court will rule on the other two motions to dismiss even though they are

now moot.

II. Jurisdiction and Venue

The second motion to dismiss puts forth a challenge to three of the suits on the grounds that they lack jurisdiction and venue pursuant to Rules 12(b)(2) and 12(b)(3) FED.R.CIV.P. Ticketmaster is incorporated in the state of Illinois and headquartered in the state of California. In addition to filing a suit in Illinois, the Plaintiffs have filed suits in Georgia, Washington, Michigan, and Massachusetts.[3]

When conducting an inquiry into personal jurisdiction, the Court begins with venue because without venue, jurisdiction is moot. *Sportsman, Inc. v. Frisch, 537 F. Supp. 1254, 1257 (N.D.Ill.. 1982).* The venue provisions relied upon by the Plaintiffs are found in the Clayton Act, *15 U.S.C. § 22* and the general venue statute *28 U.S. C. § 1301* (b). They require the Plaintiffs show Ticketmaster either inhabits the particular judicial district, may be found in that district, or transacts business there. There is no dispute that the first two elements cannot be met; the dispute is whether Ticketmaster transacts

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[3]Presumably relying on the strength of their law of the case theory, which the Court will address directly, Ticketmaster chose not to include the Massachusetts case in this motion. The Court finds however, that the analysis for the cases from Georgia, Washington, and Michigan would apply to the Massachusetts case as well.

business in the subject judicial districts. The question before the Court therefore, is whether the actions of the subsidiaries, joint-ventures, and licensees in the subject jurisdictions provide sufficient tie to the Defendant to meet the heightened standard for jurisdiction and venue over the parent corporation instead of its jurisdiction of incorporation or geographic headquarters.

In considering the venue of a parent corporation based on the actions of its subsidiaries, courts apply a day to day control test. 0.S.C. Corp. v. *Toshiba America, 491 F.2d 1064, 1066 (9th Cir. 1974); San Antonio Tel. Co. v. American Tel. & Tel. Co., 499 F.2d 349, 352 (5th Cir. 1974).* If the parent corporation has day to day control *of* the subsidiary, then it is found to transact business in the subsidiary's jurisdiction. If its control is more attenuated, there is not proper venue. *In re Chicken Antitrust Litigation, 407 F. Supp. 1285, 1291 (N.D. Ga. 1975); Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 372-373, 71 L. Ed. 684, 47 S. Ct. 400 (1927).*

The affidavit of Ned S. Goldstein, Senior Vice President and General Counsel of Ticketmaster Corporation, attests to the corporate parent-sub relationship within Ticketmaster Corporation.[4] He thoroughly describes the operations of the

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[4]Although the Plaintiffs have not filed a motion to strike the affidavit, they suggest the Court not consider it. Ticketmaster is correct however, that uncontradicted affidavits relating to personal jurisdiction control over an unverified complaint; the

Defendant and avers that the Defendant owns no property and has no bank accounts or offices in the subject jurisdictions. All day to day dealings in the subject jurisdictions are handled by the operating officers of those corporations and not by the Defendant.

The Court finds that these ties are not sufficient to provide proper venue and jurisdiction in the three challenged districts. The Plaintiffs case in Illinois, as admitted by Ticketmaster, does have proper jurisdiction and venue under the theory of the Plaintiffs case.

III. Law of the Case

The final motion to dismiss is brought against the Massachusetts case on the theory of the law of the case doctrine. The law of the case doctrine is designed to promote uniform rulings during a single case and prevent relitigation of settled issues. *UniGroup, Inc. v, Winokur, 45 F.3d 1208, 1211 (8th Cir. 1995).* The Defendant argues that this case has already been dismissed from the bench by the Honorable Robert E. Keeton in the District of Massachusetts.[5]

Court need not ignore Mr. Goldstein's averments. *Madra v. Hall, 916 F.2d 1510, 1514 (11th Cir. 1990); Alexander v. Circus Circus Enterprises, Inc., 972 F.2d 261, 262 (9th Cir. 1992).*

[5]There was no judgement entered and, despite the Court's request, neither party has filed the complete transcript from Judge

Ticketmaster points to a portion of the record from that hearing in which Judge Keeton says: "I will allow the Ticketmaster Corporation's motion to dismiss for want of showing of personal jurisdiction. " (Doc. #30, ex. A) This Court also notes Judge Keeton's earlier comments which indicated that his ruling was not meant to be a final order and that it was open to reconsideration by himself or a transferee Court: "The order I enter dismissing, if I do that, will be an interlocutory order over which this Court or any transferee court that got this case would have jurisdiction to modify. . ." (Doc. 50, Ex. A). His ruling therefore, was not final and is not supported by the law of the case doctrine.

Accordingly,

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss 4:95 MDL 1033 SNL (#34) is GRANTED and cases 4:95cv56 SNL, 4:95cv268 SNL, 4:95cv315 SNL, 4:95cv442 SNL, and 4:95cv785 SNL are DISMISSED on the merits.

IT IS FURTHER ORDERED that Defendant's Motion to Dismiss is DENIED as MOOT but in the alternative is GRANTED and cases 4:95cv56 SNL, 4:95cv442 SNL, and 4:95cv785 SNL are DISMISSED on the merits as well.

IT IS FURTHER ORDERED that Defendant's Motion to Dismiss is DENIED as MOOT and DENIED on the merits.

Keeton's hearing.

IT IS FURTHER ORDERED that the Defendant's Motion to Impose Sanctions Against Carlos Lidsky is remanded to the Southern District of Florida, Miami Division, for disposition. As a result of today's ruling, this Court no longer retains jurisdiction over the matter and the Florida court is better suited to asses an appropriate penalty, if warranted, against the actions of a member of its own bar.

IT IS FINALLY ORDERED that all cases transferred to this Court as part of In Re: Ticketmaster Antitrust Litigation 4:95 MDL 1033 SNL be remanded to their transferor courts for entry of judgement in accordance with this Order.

Dated this 31st day of May, 1996.

Stephen N. Limbaugh
UNITED STATES DISTRICT JUDGE

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APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF MISSOURI

Second Consolidated and Amended Class Action Complaint

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

IN RE:		
TICKETMASTER CORPORATION ANTITRUST LITIGATION	)	95 MDL DOCKET This Document Relates to:
Alex Campos, et al., Plaintiffs, v. Ticketmaster - Georgia, Inc., et al., Defendants	)	4:95CV56 (SNL)
Steven Hines, et al. Plaintiffs, v. Ticketmaster - Chicago, Inc., et al., Defendants	)	4:95CV268 (SNL)
Joseph Crowley, Plaintiffs, v. Ticketmaster Corp., et al., Defendants	)	4:95CV315 (SNL)
Tony Stephens, Plaintiffs, v. Ticketmaster Corp., et al., Defendants	)	4:95CV442(SNL)

Ebon Petty, et al.,	)	
Plaintiffs	)	4:95CV785(SNL)
v.	)	
Ticketmaster Corp., et al	)	
Defendants	)	

SECOND CONSOLIDATED AND AMENDED CLASS ACTION COMPLAINT FOR VIOLATIONS OF THE SHERMAN AND CLAYTON ACTS

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Plaintiffs, on behalf of themselves and others similarly situated, based upon the personal knowledge of plaintiffs as to own acts and the investigation of counsel as to all other allegations, as to which allegations they believe substantial evidentiary support will exist after a reasonable opportunity for further investigation and discovery, allege as follows:

NATURE OF THE CASE

1. Plaintiffs each purchased tickets to large-scale popular music concerts from Ticketmaster Corporation ("Ticketmaster") through one or more of its subsidiaries. Ticketmaster is the largest ticketing company in the United States with monopoly power in the market for the distribution of tickets for large-scale popular music concerts throughout the nation. Ticketmaster has intentionally achieved and maintained its monopoly power by acquiring national and regional computerized ticketing services. It has further strengthened its monopoly by entering into long-term exclusive contracts with major venues and key promoters that handle large-scale popular music concerts. These exclusive contracts are obtained by Ticketmaster through a scheme of anticompetitive "paybacks" and advances and through acts of boycott and coercion as hereinafter alleged. By its actions Ticketmaster effectively forecloses competition and raises substantial barriers to entry into the market.

2. For the sale of tickets to such events, Ticketmaster charges a "service" and "handling" fee paid directly by consumers to Ticketmaster. Ticketmaster's monopoly power allows it to raise the price of its "service"

and "handling" fees without regard to competition. Large portions of these fees are completely unrelated to "service" or "handling" but are, in fact, used as "paybacks" to venue owners and promoters. In return for these "paybacks," venues limit box office hours to force ticket buyers to buy tickets through Ticketmaster, thereby forcing consumers to pay service charges directly to Ticketmaster. Similarly, Ticketmaster is allowed to charge service fees for tickets sold at many box offices, and venues and promoters agree to the supra-competitive service and handling fees retained by Ticketmaster. As a monopolist, and based on its collusive arrangements with venue owners and promoters, Ticketmaster is thus able to gouge consumers by charging artificially high prices for its services -- while Ticketmaster and its co-conspirators benefit handsomely -- to the tune of approximately $240 million in annual service and handling fees for Ticketmaster on $1.6 billion in annual sales.

3. Throughout the United States, Ticketmaster has used a consistent game plan to acquire and maintain its monopoly power, including but not limited to, buying out its competitors, negotiating exclusive long-term contracts with venues and promoters, boycotting musical performers who attempted to sell lower priced tickets (with lower service fees) to their fans or who desired not to use Ticketmaster at all, and engaging in strategic behavior to eliminate new rivals

4. A recent example of Ticketmaster's exercise of monopoly power was its boycott of a proposed 1994 Summer Tour by the popular rock group Pearl Jam. The tour was

canceled after Ticketmaster refused to allow venues and promoters to charge a service fee of $1.80 per ticket, rather than the $3-15 usually charged. According to Pearl Jam, in documents filed with the Department of Justice, Ticketmaster and concert promoters engaged in a concerted refusal to deal with Pearl Jam and that as a result, since there is no national alternative to Ticketmaster, Pearl Jam was forced to cancel its proposed tour.

5. All of the above actions are antitrust violations under Sections 1 and 2 of the Sherman Act, and Section 7 of the Clayton Act. This complaint seeks damages on behalf of all ticket buyers who have paid supracompetitive service and handling charges on tickets purchased for large-scale popular music concerts where tickets were sold by Ticketmaster and seeks an injunction prohibiting collusion and exclusive dealing in the future.

JURISDICTION AND VENUE

6. This Court has jurisdiction of this action under the provisions of the Sherman and Clayton Acts, 15 U.S.C. 15(a),22 and 26, and 28 U.S.C. §§ 1331 and 1337.

7. The Northern District of Illinois, Northern District of Georgia, District of Massachusetts, Western District of Washington, and Eastern District of Michigan ("the "Judicial Districts") are proper venues for this cause of action pursuant to Section 12 of the Clayton Act, 15 U.S.C. § 22 and 28 U.S.C.§ 1391(b). Defendant Ticketmaster has agents and/or does business within these Judicial Districts. As explained below, jurisdiction over defendant Ticketmaster

exists in the Northern District of Illinois, Northern District of Georgia, District of Massachusetts, Western District of Washington, and Eastern District of Michigan, all jurisdictions where these consolidated suits were commenced.

PARTIES

(a) Plaintiffs

8. Plaintiff Brad Cheskes is a resident of Illinois who purchased tickets for large-scale popular music concerts through Ticketmaster - Chicago, Inc., a wholly owned subsidiary of Ticketmaster Corporation.

9. Plaintiff Alex Campos is a resident of Georgia who purchased tickets for large-scale popular music concerts through Ticketmaster - Georgia, Inc., a wholly owned subsidiary of defendant Ticketmaster Corporation.

10. Plaintiff Anthony Stephens is a resident of Washington who purchased tickets for large-scale popular music concerts through Ticketmaster Northwest, a joint venture controlled by Ticketmaster Corporation of Washington, Inc., a wholly owned subsidiary of Ticketmaster Corporation.

11. Plaintiff Joe Crowley is a resident of Massachusetts who purchased tickets for large-scale popular music concerts through Ticketmaster - Massachusetts, Inc., a wholly owned subsidiary of Ticketmaster Corporation.

12. Plaintiff Ebon Petty is a resident of Michigan who purchased tickets for large-scale popular music concerts through Ticketmaster - Michigan, Inc., a wholly owned subsidiary of Ticketmaster Corporation.

(b) The Corporate Structure of Defendant Ticketmaster Corporation

13. Defendant Ticketmaster Corporation is an Illinois corporation headquartered in Los Angeles, California. It transacts business throughout the United States, including within each of the Judicial Districts.

14. Defendant Ticketmaster Corporation has created a unified administrative structure that allows it to transact business throughout the United States via its wholly owned subsidiaries, joint ventures, and licensees. This structure allows Ticketmaster Corporation to direct the contracting, pricing, and business operations of its subsidiaries, joint ventures and licensees, as set forth below, including in each of the Judicial Districts where actions are pending in this litigation.

15. In moving before the MDL Panel to transfer these actions, Ticketmaster described its corporate structure as follows:

> The ultimate parent entity is Ticketmaster Holdings Group, Ltd. ("Holdings"), an Illinois corporation. Holdings owns 100% of the stock of Ticketmaster Corporation, an Illinois corporation. Each of the other Ticketmaster entities (which in most cases are the actual operating companies) are directly or indirectly controlled by Ticketmaster Corporation or are joint ventures in which a subsidiary of Ticketmaster Corporation owns an equity interest and is the managing partner. . . . (Emphasis added.]

16. Although the full details of Ticketmaster's structure will only be revealed after discovery, the operating ventures owned and controlled by Ticketmaster at least include, or have included:

a. Ticketmaster - New York, Inc;
b. Ticketmaster - Massachusetts, Inc.;
c. Ticketmaster - Florida, Inc.;
d. Ticketmaster - Georgia, Inc.;
e. Ticketmaster - Chicago, Inc.;
f. Ticketmaster Corporation of Washington, Inc.;
g. Ticketmaster - Southern California, Inc.;
h. Ticketmaster - Texas, Inc.;
i. Ticketmaster - Indiana, Inc.;
j. Ticketmaster - Arizona, Inc.;
k. Ticketmaster - Colorado, Inc.;
l. Ticketmaster - Illinois, Inc.;
m. Ticketmaster - Kentucky, Inc.;
n. Ticketmaster - Knoxville, Inc.;
o. Ticketmaster - Las Vegas, Inc.;
p. Ticketmaster - Louisiana, Inc.;
q. Ticketmaster - Michigan, Inc.;
r. Ticketmaster - Midwest, Inc.;
s. Ticketmaster - New Orleans, Inc.;
t. Ticketmaster Corporation of Ohio;
u. Ticketmaster - New England, Inc.;
v. Ticketmaster - Tennessee, Inc.;
w. Ticketmaster of Topeka, Inc.;

x. Ticketmaster - Wichita, Inc.;

y. Ticketmaster - Wisconsin, Inc; and

z. Southwest Ticketing, Inc.

17. Ticketmaster Corporation transacts business and is found in each of the judicial districts in which actions are pending by means of its control of each of the entities (a)-(z) (the "Ticketmaster entities") above, which in turn each transacts business and is found in these Judicial Districts.

18. Ticketmaster uses its ownership interest in each of these entities to dominate and control the activities of each of the Ticketmaster entities.

19. Ticketmaster has the power to, and does, appoint directors and officers of each of the Ticketmaster entities.

20. Certain officers of Ticketmaster also serve as officers of many of the above-listed Ticketmaster entities.

21. Officers of Ticketmaster Corporation negotiate or participate in negotiating contracts with promoters and venue owners entered into by the Ticketmaster entities. These contracts are signed by an individual who is an officer for both the Ticketmaster entity and Ticketmaster Corporation. Ticketmaster Corporation has the power to approve or reject the terms of any contract entered into by any Ticketmaster entity.

22. The contracts entered into by the Ticketmaster entities contain standardized terms dictated by Ticketmaster Corporation. One of the standard terms is that all notices sent

to any Ticketmaster entity must also be sent to Ticketmaster Corporation in Los Angeles.

23. Ticketmaster Corporation controls the use of its logo on contracts, promotional materials, ticket stubs, and other documents distributed by the Ticketmaster entities.

24. Ticketmaster Corporation's consolidated federal income tax returns include the results of its subsidiaries, joint venturers and licensees (the Ticketmaster entities).

25. Ticketmaster Corporation has reported its operations on a consolidated basis without breaking out separately the financial results of its subsidiaries, joint ventures and licensees.

26. Other unnamed co-conspirators include promoters and venues who share in the monopoly revenues for ticket services. Additional defendants may be named in this lawsuit as discovery is undertaken.

RELEVANT MARKET

27. The relevant geographic market is the United States. Within the relevant geographic market, there is a well-recognized geographic submarket for national tours of large-scale popular music concerts which consist of the largest metropolitan markets in the United States where Ticketmaster has almost exclusive dominance in the distribution of said tickets. Control of these large markets gives Ticketmaster control over ticketing for national tours by popular music entertainers all across the country.

28. The relevant service market is the distribution

of tickets to large-scale popular music concerts. Ticketmaster's exclusive-dealings contracts and its other collusive practices have erected artificial barriers to entry into the relevant service market by other competitors.

29. Large-scale popular music concerts include performances by entertainers such as the Eagles, the Rolling Stones, U-2, and Barbra Streisand. These entertainers arrange nationwide tours by negotiating with large-scale venues in large metropolitan markets. The vast majority of these major venues have exclusive contracts with Ticketmaster. This gives Ticketmaster monopoly power in the relevant market. Entertainers planning a nationwide tour of major venues cannot avoid Ticketmaster's service fees and convenience charges imposed upon their fans. Thus class members pay Ticketmaster excessive service fees whether they live in New York, Chicago, Seattle, Miami, or Detroit.

30. The relevant market does not include the distribution of tickets to "family attractions" and professional sports. These tickets, even if distributed by Ticketmaster, include lower service and handling fees and have a different target market than large-scale popular music concerts. Ticketmaster's contracts with venues contain different, lower pricing structures for these different types of events.

31. The computerized distribution of admission tickets to large-scale popular music concerts takes place through three alternative methods: (1) consumers can purchase tickets from Ticketmaster by telephone, paying for the tickets with a credit card, and receiving the Tickets by

mail; or (2) consumers can purchase tickets at a designated outlet, other than the venue, typically paying cash for the tickets; or (3) consumers can purchase tickets at the venue box office, which may be operated by either the venue or by Ticketmaster.

32. The price of the ticket is paid directly to Ticketmaster. Ticketmaster also charges and collects a separate so called "convenience fee" or "service charge" for its sale of the ticket(s), regardless of whether the sale occurs by telephone or at a designated outlet.

33. If the ticket is sold by telephone Ticketmaster arbitrarily exacts a higher premium on the "convenience fee" or "service charge". the higher premium range is between 75 cents and $1.25 or more in excess of the fee imposed on tickets purchased at a designated outlet, which can range between $3-15 each ticket. Ticketmaster also imposes an additional "processing" or "handling" fee on tickets sold by telephone and mailed to the consumer. This handling fee is typically assessed on each order without regard to the number of tickets sold.

34. For example, for a $38.50 ticket concert at the Miami Arena for September 17 charged a $3.50 service charge for a ticket designated outlet with cash only and $4.75 for a ticket purchased via telephone and paid by credit card. For telephone purchases, in addition to the $4.75 charge per ticket, Ticketmaster collects a handling charge of $1.60 per order.

35. Venue box offices are almost always remote

from the great majority of ticket purchasers and are open for only limited periods. Ticketmaster's contracts with the venues often limit box office hours, thereby effectively eliminating competition with Ticketmaster's sales for shows which sell out quickly. In other instances, Ticketmaster may operate the box office as an outlet, collecting a service charge and thereby eliminating all pretext of box office competition. Finally, in some instances, there may not even be a box office.

36. Ticketmaster claims these "service," "convenience" and "handling" fees are no different from the payments made by Coke or Pepsi for the license to sell soft drinks in an arena. A fundamental difference, however, is that consumers can choose not to buy a soft drink while attending a concert. In most cases, plaintiffs and members of the class have no choice but to buy their tickets through Ticketmaster if they want to attend a large-scale popular music concert, especially if the concert is one that sells out quickly. Choosing not to buy from Ticketmaster is tantamount to choosing not to attend at all.

NATURE OF TRADE OR COMMERCE

37. Ticketmaster is engaged in the business of distributing tickets to consumers on behalf of venues and promoters. Ticketmaster, through its wholly owned subsidiaries, joint ventures and contracts with either the venues or the promoters. Nonetheless, the ticket distribution service charge is imposed directly on the consumer at the time of purchase.

38. Ticketmaster operates a computerized network

of ticket sales outlets in the United States for the sale of tickets. Throughout the United States, Ticketmaster has taken steps to drive out most or all competitors, as hereafter alleged. Ticketmaster is by far the largest seller of large scale popular music concert tickets in the country, with sales of over 50 million tickets in 1993, and 55 million in 1994 valued at an estimated $1.6 billion. In 1994 their sales brought in $240 million in fees to Ticketmaster. According to a report in the Seattle Weekly, publish on November 2, 1.994, Ticketmaster sells 90% of all tickets to large-scale popular music concerts and has exclusive contracts with the largest and most popular arenas and venues controlling two-thirds of the market. Ticketmaster's domination of the market permits it to control the vast majority of ticket sales for large-scale popular music concerts in venues where it does not have an exclusive contract.

ANTICOMPETITIVE ACTS

A. Ticketmaster Acquires Its Competitors

39. Ticketmaster became the nation's largest distributor of large-scale popular tickets by a series of anticompetitive acts. In the last ten years, Ticketmaster has acquired stock or assets of no less than 14 competitors or potential competitors.

40. In 1991 it bought its only national competitor, Ticketron, and promptly closed it down. Venues using Ticketron had little or no choice but to allow Ticketmaster to take over their ticketing operations. Before and after its acquisition of Ticketron, Ticketmaster acquired regional

computerized services, including the South East-Atlanta Ticket Service in Georgia, Select-a-Seat in Florida, CATS in Kansas, Select A-Seat in Denver, Ticketworld USA in New York City and Detroit, TicketPro in New England, Dayton's Ticketing in Minneapolis, Softix in Florida, Tickethub in Memphis, the Southland Corp. in Texas, and licensing agreements with Bay Area Seating Service in San Francisco. As a consequence, Ticketmaster has no nation-wide competitors in the distribution of tickets to large-scale popular music concerts. Ticketmaster has some local competitors, but these are various small firms, which operate solely in local markets and are restricted from expanding their operation because of Ticketmaster's anticompetitive and collusive practices.

41. In 1986 a Ticketmaster subsidiary, Ticketmaster Southern California, Inc., entered into a market allocation agreement with Bay Area Seating Services, Inc. ("B.A.S.S."). This conspiracy in restraint of trade permits Ticketmaster to restrict competition in all of California.

42. In April 1994, Ticketmaster acquired control over Pacer CATS, a computerized ticketing service company that had been planning to compete directly with Ticketmaster in the market for large-scale popular music concerts. As a result of these acquisitions, Ticketmaster has, in its own words, become the "largest automated ticketing company in the United States."

B. Ticketmaster's Use of Exclusive Dealing

43. To cement its control over the distribution of

tickets to concerts, and to entrench its monopoly power, Ticketmaster has entered into exclusive dealing agreements with many important venues for concerts, including such prominent venues as the Great Western Forum in Los Angeles and Madison Square Garden in New York. These contracts typically have terms of three to five years. In order to lock up desired venues and promoters and thus exclude competition and prevent new entrants, Ticketmaster offers them monetary incentives -- in some cases millions of dollars -- to secure exclusive long term contracts. For example, in May 1995, Ticketmaster obtained a contract with the Alamodome in San Antonio by advancing the city $100,000, installing $150,000 of equipment and promising to spend $300,000 a year on promotion. In addition, Ticketmaster has exclusive dealing agreements with almost every promoter of concerts in the United States. Thus, where Ticketmaster does not have a contract with an venue, it maintains its monopolistic powers by obtaining exclusive contracts with promoters. Because most major rock bands or popular entertainers have no choice but to use these promoters, Ticketmaster becomes the exclusive ticket distributor even where it has no exclusive contract with a venue, such as the Seattle Coliseum. Thus, through its contracts with promoters and venues, Ticketmaster has ironclad control over ticketing for any large-scale popular music concert at major venues. Ticketmaster claims that it has never lost a significant client to a competitor.

44. According to Pollstar, an industry magazine, by 1991 Ticketmaster had exclusive contracts with venues

representing 63.2 percent of the country's 9.9 million seats. Further, through its contracts with promoters and the like, Ticketmaster sells the tickets for a significant percentage of the remaining venues.

45. The standard form contracts utilized by Ticketmaster all include a section entitled "Exclusive Rights." A typical Ticketmaster contract with the City of Tampa, operator of the Tampa Convention Center, dated October 1, 1991, reads as follows:

> Principal hereby grants to Ticketmaster, and Ticketmaster accepts from Principal, the exclusive right during the term of this Agreement to sell as Principal's agent at Outlets and/or by Telephone Sales all Tickets made available to the public for any attraction scheduled or presented by the Principal at the facility and sold at the Facility. Not surprisingly, Ticketmaster contracts with promoters contain a clause identical to the above in almost every respect. These contracts give Ticketmaster the exclusive right to distribute tickets over the telephone and at outlets for all events at the venue with whom it contracts or at the venue where the promoter is presenting an event.

46. Ticketmaster imposes service charges for distributing tickets to concerts that it sells over the telephone or at designated Ticketmaster outlets. A percentage of these service charges is often paid back by Ticketmaster to

promoters and venues, giving them a vested interest in keeping service charges high and Ticketmaster in control.

47. As explained above, Ticketmaster has, also used long-term exclusive contracts with venues to cement its market dominance. Ticketmaster makes substantial up-front payments or paybacks to venues in return for these exclusive contracts. These actions, all combined with the exclusive contracts with promoters, were intended by Ticketmaster to, and have had the effect of, significantly raising the entry barriers for any potential competitor to Ticketmaster

48. These exclusive contracts have terms of up to seven years, and many have terms of three to five years. The duration of the contracts is not based on competitive conditions or legitimate business considerations. Ticketmaster employs these contract terms for the purpose and direct effect of excluding actual and potential rivals.

49. Ticketmaster has used its market power to steadily raise its service and handling fees in the relevant market without regard to competition. Prior to Ticketmaster's purchase of Ticketron, service fee charges were typically $1.50 per ticket. As a result of its monopoly power increases in ticket service charges have out paced increases in ticket prices over the past five years.

50. Frederic Rosen, CEO of Ticketmaster, has urged venue owners and promoters to raise ticket prices as a means of extracting even higher service fees from ticket buyers, since service fees are often pegged to the price on the face of the ticket.

C. Ticketmaster's Few Existing Competitors Are Threatened by Ticketmaster's Use of Its Monopoly Power

51. The use of exclusive long-term contracts with venues and promoters, and the payment of large up-front sums of money or paybacks to the venues, has eroded dramatically the ability for free market competition.

52. For example, Strawberries Music & Video Stores and its subsidiary, Waxie Maxie's, have been leaders in the retail music business for over 20 years with 146 stores in eleven states in he Northwest and Mid-Atlantic regions, and have maintained an independent ticket agency. However, their ability to compete in the ticket selling business has diminished as a direct result of Ticketmaster's exclusive contracts with venues. Because of this exclusivity, many promoters who would like the opportunity to utilize its services are denied this right, and consumers are denied low-cost alternatives to Ticketmaster. Strawberries' and Waxie Maxie's service charges are fixed at $1.50 for all shows.

53. Other smaller ticketing agencies scattered throughout the United States experience the same market barriers. Many of these companies cannot compete with Ticketmaster's huge up-front payment or paybacks to the venues or promoters. However, most or all of Ticketmaster's struggling competitors still manage to charge a significantly lower service charge. For example, Smith Tix, in the state of Utah, where there is no other competing ticket service, imposes a service charge ranging from $1.00 to a maximum

of $2.65. By contrast, the Ticketmaster service charge for the 1994 Eagles concert at the Rose Bowl in California was $7.25 by telephone, plus another $2.50 charge per order.

54. Ticketmaster's monopoly has not only raised prices but it has stifled innovation as well. Ticketmaster's telephone ticketing and outlet sales systems have become outdated. Superior technology for touch-tone telephone ticketing and interactive kiosks has been unable to reach the market because Ticketmaster controls the ticket inventory. Ticketmaster customers wait on hold for long periods of time at peak periods. Advances in technology enable the sale of tickets to a single event by more than one distributor, just as more than one travel agent can sell an individual seat on any particular flight. Ticketmaster's use of long-term exclusive contracts across the nation inhibits the competition for ticket distribution that modern technology would otherwise encourage.

D. Ticketmaster and the NACPA Organize a Boycott of Pearl Jam

55. A recent example of Ticketmaster's power to control ticket distribution prices and exclude competition arose early in 1994 when the popular Seattle rock group Pearl Jam proposed a nation-wide 1994 Summer Tour with lower ticket and service fee prices.

56. After a series of altercations with Ticketmaster in 1993, Pearl Jam decided in 1994 that it was no longer willing to do business on Ticketmaster's terms. Through its agent, the William Morris Agency, the band notified

promoters that on its planned 1994 Summer Tour it would (i) not permit service charges to exceed ten percent of an $18.00 ticket price, (ii) require that the purpose and amount of any service charges be stated clearly on the face of the ticket, and (iii) refuse to permit the inclusion of paid advertising on the backs of tickets.

57. In response to this challenge to its control over the distribution of tickets to concerts -- which if allowed to proceed would encourage other bands to rebel against Ticketmaster's imposition of high service charges -- Ticketmaster went on the offensive and began to flaunt its monopoly power. Organizing a group boycott against Pearl Jam, Ticketmaster informed Ben Liss, executive director of North American Concert Promoters Association ("NACPA"), that Ticketmaster would "aggressively enforce" its exclusive dealing agreements with promoters. The membership of NACPA is comprised of the largest popular music concert promoters in the United States. As anticipated by Ticketmaster CEO Fred Rosen, this overt threat was conveyed to the membership of NACPA, a trade association whose members are competitors. In a March 24, 1994 memorandum remarkable for its candor, Mr. Liss informed the promoters -- to whom he referred as "brother raccoons" -- that "Ticketmaster's stance is that they have been loyal to their partners in this business and they hope & expect that their partners will reciprocate." In case the promoters did not immediately grasp the importance of refusing to deal with Pearl Jam, Mr. Liss stated, "I do not need to remind you that

loyalty in our industry is a valuable asset and that long-term relationships depend upon it." This letter was sent to all NACPA members throughout the United States. Mr. Liss was uniquely positioned to convey this threat because of his long-term relationship with Ticketmaster. Mr. Liss was the president of Ticketron at the time it was Ticketmaster in 1991.

58. NACPA's executive director wrote to the membership again on March 25, 1994 to reinforce his earlier message the importance of remaining loyal to Ticketmaster, and to give promoters a road map for implementing the group boycott of Pearl Jam. Removing any doubt that he was acting at the behest of Ticketmaster, Mr. Liss noted that "Fred," referring to Ticketmaster CEO Rosen, "has indicated that he intends to take a very strong position on this issue to protect Ticketmaster's existing contracts with promoters and facilities." In addition to repeating Ticketmaster's threat to institute breach of contract actions against promoters that dealt with Pearl Jam, the memorandum also states that Ticketmaster "will use all available remedies to protect itself from outside parties that attempt to interfere with [its] existing contracts," a threat to sue Pearl Jam for tortious interference that Ticketmaster presumably hoped would be conveyed back to the band.

59. As a result of Ticketmaster's efforts, most promoters and venues refused to do business with Pearl Jam on the terms stated by the band. The group boycott organized by Ticketmaster had its intended effect. Pearl Jam canceled

its 1994 summer tour.

60. Pearl Jam tried again in 1995 to organize a nationwide summer tour. Although they were able to find another ticket distribution company, ETM Entertainment Network, which was willing to distribute their tickets for a lower fee, the long-term exclusive contracts maintained by Ticketmaster with the vast majority of venues prevented the tour from going forward except in a very limited number of cities.

61. Due to defendants' concerted actions and Ticketmaster's monopoly power, Pearl Jam fans, and other concert-goers across the country, have been denied the benefit of free and open competition in the market for ticket distribution services. Other bands, such as Aerosmith and R.E.M. have also tried unsuccessfully to break Ticketmaster's monopoly hold on the market.

E. Ticketmaster's Acquisition of Pacer CATS Has Entrenched Ticketmaster's Monopoly

62. In early 1994 Ticketmaster acquired a 50% controlling stock interest in Pacer CATS, paying substantially more for half of the company than the objective value of the entire company as determined by investment bankers. At the same time, Ticketmaster entered into a twenty-year joint venture agreement with Wembley, Plc., the other 50% owner, allowing Ticketmaster to exercise management control over Pacer CATS.

63. A September 1993 Offering Memorandum prepared by Pacer CATS's parent stated, "the Company's

management believes its fully automated systems could replace more expensive ticketing service provided by third parties (such as Ticketmaster in the United States), and that this market-offers substantial potential for future system sales." Thus, this evidences that the acquisition has lessened competition and helped entrench Ticketmaster's monopoly.

CLASS ACTION ALLEGATIONS

64. Plaintiffs bring this action on behalf of themselves and all those similarly situated, as a class action pursuant to the provisions of Rule 23(b)(2) and (b)(3) of the Federal Rules of Civil Procedure.

65. The class consists of all purchasers of tickets to large-scale popular music concerts from defendant Ticketmaster from June, 1990 to the present.[1] The exact duration of the class period may be expanded or modified as discovery proceeds.

66. Plaintiffs believe there are of thousands 'of class members as described above; their exact number and identities are presently unknown to plaintiffs, but are known to defendants. The class is so numerous that joinder of all members is impracticable.

67. There are questions of law and fact common to the class, including but not limited to:

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[1]Excluded from the class are those who are bound by the 1993 settlement of similar charges in California. However, California ticket purchasers not covered by the settlement are included, including California purchasers of tickets after 1993.

a. Whether Ticketmaster has monopoly power in the market for ticket distribution for large-scale popular music concerts;

b. Whether Ticketmaster unlawfully obtained its monopoly power through mergers, acquisitions, and the employment of long-term exclusive contracts with key venues;

c. Whether Ticketmaster has abused its monopoly power by the use of anticompetitive practices, including long term exclusive contracts, acquisitions of competitors, and boycotts;

d. Whether Ticketmaster has raised, fixed or stabilized the prices of service and handling fees in the relevant market;

e. Whether Ticketmaster, North American Concert Promoters Association and various venues have engaged in a concerted refusal to deal with, or a boycott of, performers who wished to undertake low-price nationwide tours; and

f. Whether plaintiffs and members of the class have been damaged as a result of Ticketmaster's actions.

68. Plaintiffs, claims and/or defenses are typical of the claims or defenses of the class.

69. Plaintiffs, as members of said class, will fairly and adequately protect the interests of the class. The interests of plaintiffs are coincident with, and not antagonistic to, those of the remainder of the class. Plaintiffs have obtained counsel experienced and qualified to prosecute class action litigation.

70. The prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the parties opposing the class.

71. The prosecution separate actions by individual members of the class would create a risk of adjudications with respect to individual members of the class which would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

72. The parties opposing the class have acted or refused to act on grounds generally applicable to the class, thereby making final injunctive relief or corresponding declaratory relief appropriate with respect to the class as a whole.

73. The questions of law or fact common to the members of the class predominate over any individual member, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy between plaintiffs and defendants.

74. The class is readily definable and, in large part, by virtue of defendant's records and plaintiffs' credit card receipts, is one for which records exist. Defendant Ticketmaster maintains a mailing list of all purchasers of tickets over the telephone, and uses that list for marketing purposes as an additional source of income. Prosecution as

questions affecting any class action will eliminate the possibility of repetitious litigation, while also providing redress of claims too small to support the expense of individual, complex litigation.

75. Proof of damages is a common issue and can be established uniformly for the entire class.

76. Defendants have acted uniformly with respect to all class members.

INTERSTATE COMMERCE ALLEGATIONS

77. Ticketmaster's sales of tickets constitute a substantial volume of interstate commerce. In 1994 it sold $1.6 billion in tickets and earned approximately $240 million in service and handling fees.

78. Ticketmaster contracts with promoters for popular entertainers, such as the Rolling Stones, for the sale of ticketing services for nationwide tours. These agreements, including the amount and allocation of the Ticketmaster service fees, are then implemented throughout the country at each local venue, whether or not the venue has an exclusive contract with Ticketmaster.

79. Ticketmaster utilizes telephone wire services for the receipt of ticket orders throughout the United States and for computer information transmissions within the computerized network of ticket sales outlets.

80. Ticketmaster uses the U.S. Postal Service for the delivery of ticket orders placed by telephone for delivery throughout the United States.

81. Ticketmaster offers and advertises for sale

tickets to large-scale popular music concerts throughout the United States.

82. Ticketmaster uses the U.S. Postal Service and various wire services to transfer tickets, information, and monetary funds throughout the United States and beyond.

COUNT I
Violation of Section 2 of the Sherman Act
(MONOPOLIZATION)

83. Plaintiffs reallege the preceding paragraphs as if fully set forth herein.

84. Defendant Ticketmaster possesses monopoly power over the distribution of tickets in the relevant geographic and product markets.

85. The monopoly power described above was initiated, supervised, managed, directed, coordinated, and controlled by Ticketmaster.

86. Defendant Ticketmaster willfully attained and maintained monopoly power over the sale of tickets in the relevant market by acquiring long-term exclusionary contracts with venue owners and concert promoters, by paying substantial up-front revenues to obtain and retain exclusionary contracts by purchasing and/or merging with its sole existing national competitor Ticketron, and by purchasing and/or merging with many of its regional or potential competitors. Ticketmaster has erected barriers to the entry of competitors into the relevant market, in order to maintain and/or increase

its monopoly share of the market. In doing so, defendant Ticketmaster has eliminated competition in the relevant geographic market for the sale of tickets to large-scale popular music concerts.

87. Defendant Ticketmaster's actions in obtaining monopoly power were carried out through anti-competitive means rather than as a result of natural market forces, or through business acumen or skill.

88. Defendant Ticketmaster, through the maintenance, exercise and abuse of monopoly power, has forced plaintiffs and members of the class to purchase tickets from defendant. Ticketmaster has raised the price of the service charges causing plaintiffs and members of the class to pay more for tickets than they would have had defendant not eliminated competition for the distribution of large-scale popular music concert tickets.

89. Defendant Ticketmaster has unlawfully exploited its monopoly power over the sale of tickets to perpetuate and extend its monopoly power in the relevant market.

90. Defendant Ticketmaster has acquired and maintained monopoly power willfully, as evidenced by the conduct described in this count and in the general allegations of this complaint.

91. Ticketmaster's exclusionary conduct, both separately and collectively, has foreclosed competition, deprived consumers of the opportunity to receive better service and lower prices and, in some instances, has

diminished or deprived consumer access to certain large-scale popular music concert entertainers.

92. Ticketmaster has exercised monopoly power by charging supra competitive service fees unjustified by the costs actually incurred by Ticketmaster and by boycotting certain large-scale popular music concert entertainers.

93. As a result of Ticketmaster's unlawful and anti-competitive conduct, plaintiffs have suffered antitrust injury and injury to their business and property as well as irreparable injury.

94. As a result of Ticketmaster's actions, plaintiffs and members of the class have been damaged -- i.e., they have been gouged with excessive fees by virtue of defendants' monopoly power and paid those excessive fees directly to Ticketmaster, they have been subject to lost or diminished access to large-scale popular music concerts.

95. The conduct of defendant Ticketmaster described in this count constitutes monopolization in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, made applicable to civil actions pursuant to Section 4 of the Clayton Act, 15 U.S.C. 15.

96. Plaintiffs and members of the class are entitled to injunctive relief to prohibit the continuation of such conduct to recover threefold damages sustained, pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15.

97. Plaintiffs and members of the class are entitled to attorneys' fees and costs, pursuant to Section 4 of the Clayton Act, 15 U.S.C. 9 15.

COUNT II

Violation of Section 2 of the Sherman Act (ATTEMPT TO MONOPOLIZE)

98. Plaintiffs reallege the preceding paragraphs as if fully set forth herein.

99. Defendant Ticketmaster has employed methods, means and practices which accomplish monopolization of ticket sales in the relevant market.

100. Defendant Ticketmaster, with the specific intent to do so has conspired to exclude competitors from the relevant market by acquiring exclusionary contracts with venues through "paybacks" and by purchasing and/or merging with competitors, erecting barriers to the entry of competitors into the market and thereby creating a dangerous probability of eliminating competition in the relevant market for the distribution of large-scale popular music concerts tickets.

101. Defendant Ticketmaster has also made agreements with and/or acted in concert with North American Concert Promoters Association and other unnamed co-conspirators for the purpose and goal of creating and maintaining Ticketmaster's monopoly in the sale and distribution of tickets in the relevant market, so that defendant Ticketmaster is the exclusive distributor of tickets in the relevant market.

102. As a result of this conspiracy, plaintiffs and members of the class have been denied the benefits of free

and open competition and have paid excessive service fees for tickets.

103. The conduct of defendant Ticketmaster described in this count constitutes an attempt to monopolize in violation of Section 2 of the Sherman Act, 15 U.S.C. 2, made applicable to, civil actions., pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15.

104. As a result of Ticketmaster's actions, plaintiffs and members of the class have been damaged.

105. Plaintiffs and members of the class are entitled to injunctive relief to prohibit the continuation of such conduct and to recover threefold damages sustained pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15.

106. Plaintiffs and members of the class are entitled to attorneys' fees and costs, pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15.

COUNT III

Violation of Section I of the Sherman Act (PRICE FIXING)

107. Plaintiffs reallege the preceding paragraphs as if fully set forth herein.

108. In a number of metropolitan areas in the United States, Ticketmaster or its related companies have exclusive contracts to provide ticketing services for the major arenas, stadiums and other venues that are used for large-scale

popular music concerts. Pursuant to those agreements, the venue grants Ticketmaster the exclusive right to sell tickets by telephone at that venue and in some cases shares in the supra competitive service charges that result from the exclusive dealing. Ticketmaster's contracts with venues frequently specify that Ticketmaster will be the sole ticket seller in preference to all other ticketing services as well as to the box office. Even when the contract does not expressly provide for exclusivity, Ticketmaster creates a de facto exclusive relationship with venues and promoters by reaching agreement giving the venue or promoter strong incentives to deal only with Ticketmaster.

109. Ticketmaster also has reached understandings with a number of the largest promoters whereby the promoters and Ticketmaster work together to maintain exclusive control over ticket sales to large-scale popular music concerts and to exclude competition. A number of promoters have agreed to use Ticketmaster as the exclusive ticketing company for large-scale popular music concerts, and in return, Ticketmaster has agreed to share service fees with promoters. Upon information and belief, Ticketmaster and certain promoters or promoter organization(s) have also reached an understanding to resist any efforts by performers to by-pass either Ticketmaster or the promoter.

110. Ticketmaster has acted as the "ringmaster" of a nationwide cartel of venues who all benefit from the lack of competition in the market for ticketing services by sharing in the supra competitive fees charged by Ticketmaster and paid

by plaintiffs and members of the class.

111. Ticketmaster has conspired with arena and venue owners across the country to fix, raise, maintain and stabilize the prices of ticket distribution services provided by Ticketmaster. Ticketmaster has used threats of litigation and economic coercion to enforce the price-fixing scheme.

112. Ticketmaster and its co-conspirators have further forced plaintiffs and members of the class to purchase tickets exclusively from defendant Ticketmaster by severely restrict box office sales or by turning over all box office ticket sales to Ticketmaster. As a result, Ticketmaster has fixed, raised, maintained and stabilized prices for service and handling fees, causing plaintiffs to pay prices directly to Ticketmaster for tickets in excess of what plaintiffs would have paid had defendants not combined, agreed or conspired to fix ticket service fees.

113. The conduct of Ticketmaster and co-conspirators, described in this count, constitutes an unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, made applicable to civil actions pursuant to Section 4 of the Clayton Act, § 15.

114. As a result of Ticketmaster's and to-conspirators' actions, plaintiffs and members of the class have been damaged.

115. Plaintiffs and members of the class are entitled to injunctive relief to prohibit the continuation of such conduct and to recover threefold damages sustained, pursuant

to Section 4 of the Clayton Act, 15 U.S.C. § 15.

116. Plaintiffs and members of the class are entitled to attorneys' fees and costs, pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15.

COUNT IV

Violation of Section 1 of the Sherman Act (BOYCOTT)

117. Plaintiffs reallege the preceding allegations ions as if fully set forth herein.

118. Defendant Ticketmaster, along with North American Concert Promoters Association members, and other unnamed co-conspirator, venues and promoters possess market power in the sale and distribution of tickets in the relevant market.

119. Ticketmaster has made agreements between itself and with co-conspirators, jointly and severally, to boycott the sale of tickets for performers such as Pearl Jam who wish to reduce the price of tickets purchased from defendant Ticketmaster, substantially impairing any competition in the sale of tickets in the relevant market.

120. Ticketmaster and its co-conspirators, through their boycott of performers seeking lower service fees, have created an unreasonable restraint of interstate trade or commerce. As a result, plaintiffs and members of the class have paid prices for large-scale popular music concert tickets

in excess of what plaintiffs would have paid had co-defendants and co-conspirators, jointly and severally, not boycotted the sale of tickets with lower service fees.

121. The conduct of Ticketmaster and its co-conspirators, jointly and severally, described in this count constitutes a group boycott in restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

122. As a result of Ticketmaster's and co-conspirators' actions, plaintiffs and members of the class have been damaged.

123. Plaintiffs and the class members are directly injured by the defendants' conduct and are in the best position to bring this claim as they have been foreclosed from the opportunity to be entertained by certain groups, such as Pearl Jam, through the flexing of Ticketmaster's monopoly power.

124. Plaintiffs and members of the class are entitled to recover threefold damages sustained, pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15.

125. Plaintiffs and members of the class are entitled to attorneys' fees and costs, pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15.

COUNT V

Unlawful Acquisition in Violation of § 7 of the Clayton Act

126. Plaintiffs reallege the preceding allegations as

if fully set forth herein.

127. Ticketmaster's acquisitions of Ticketron, Pacer CATS and other ticketing companies have created a reasonable possibility of lessening competition. These acquisitions have tended to create a monopoly in the market for the distribution of tickets for large-scale popular music concerts in violation of Section 7 of the Clayton Act.

128. The acquisitions have impeded, if not foreclosed, entry into the relevant markets for large-scale popular music concert ticketing.

129. The acquisitions have caused a lack of price competition, and retarded innovation in the distribution of tickets that otherwise would have occurred, but for the elimination of the most promising regional competitors or new entrants.

130. As a result of the anticompetitive foreclosure effects of the acquisition, plaintiffs and members of the class have been deprived of the benefits of free and open competition in the relevant market.

131. As a result of defendants, acquisitions, plaintiffs and members of the class have been damaged.

132. Plaintiffs and members of the class are entitled to injunctive relief and threefold damages sustained, pursuant to Sections 16 and 44 of the Clayton Act, as well as reasonable attorneys' fees and costs.

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a trial by jury on all issues so triable as a matter of right.

DEMAND FOR RELIEF

WHEREFORE, plaintiffs, on their own behalf and on behalf of the class, pray this Honorable Court for entry of judgment:

a. declaring this action to be a class action;

b. awarding to plaintiffs and all members of the class actual and compensatory damages, together with pre-judgment interest;

c. awarding to plaintiffs and all members of the class treble damages;

d. ordering appropriate injunctive relief, including a halt to group boycotts, enforcement exclusive contracts with venues, and anticompetitive acquisitions by Ticketmaster;

e. awarding plaintiffs their costs and expenses incurred in this action, including reasonable experts' fees;

f. awarding plaintiffs reasonable attorneys, fees and costs; and

g. enjoining defendants from any future engagement in any said endeavors which violate federal antitrust law.

DATED: September 29, 1995.

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APPENDIX D

RELEVANT STATUTES

Section 1 of the Sherman Act

15 U.S.C. § 1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 2 of the Sherman Act

15 U.S.C. § 2

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $ 10,000,000 if a corporation, or, if any other person, $ 350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 4 of the Clayton Act

15 U.S.C. § 15

(a) Amount of recovery; prejudgment interest. Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only --

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

Supreme Court, U.S.
FILED
AUG 21 1998
OFFICE OF THE CLERK

No. 98-127

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ALEX CAMPOS, et al.,

Petitioners,

v.

TICKETMASTER CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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16 PP

QUESTIONS PRESENTED

1. Was the Eighth Circuit correct in holding that the plaintiff ticket-purchasers are not direct purchasers of the ticket-distribution services provided by defendant Ticketmaster under its contracts with venue owners, and therefore are barred by the *Illinois Brick* doctrine from maintaining an action for damages under the Sherman Act?

2. Was the Eighth Circuit correct in holding that indirect purchasers may not assert a "co-conspirator" exception to the rule of *Illinois Brick* if the alleged co-conspirators are not parties to the action?

STATEMENT IN COMPLIANCE WITH RULE 29.6

The parent company of respondent Ticketmaster Corporation is Ticketmaster Group, Inc. Ticketmaster Group, Inc. is a wholly-owned subsidiary of USA Networks, Inc. Ticketmaster Corporation's subsidiaries (other than wholly-owned subsidiaries) are MC France SA, Ticketmaster-Argentina SA, Venta de Boletas Por Compudoras, Ticketmaster-Australasia, Ticketmaster-Australasia (#2), Ticketmaster Bass Victoria Pty Ltd., Ticketmaster Bass Australasian Pty Ltd., The Movie Ticket Co., and Ticketmaster Golf.

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STATEMENT OF THE CASE

Respondent Ticketmaster contracts with venues and promoters to provide computerized ticket services for concerts, sports, family shows, Broadway shows, and other live entertainment events. Typically the contracts are exclusive contracts for a term of years. The services provided under the contracts include keeping a computerized inventory of available seats, providing information about current and upcoming events, providing telephone facilities for taking orders, receiving orders, making a computer-assisted selection of seats to fill the orders, mailing tickets to the purchasers, and collecting the price of the tickets through credit-card authorizations. Ticketmaster also contracts with independent third parties to maintain ticket outlets at department stores and other easily accessible locations.

Ticketmaster does not buy and resell tickets; it acts only as agent of the venue in executing the sales of tickets. The price of the tickets sold through Ticketmaster includes a separately-stated service charge for processing the order and delivery of the ticket. The amount of the service charge is prescribed in the contract between Ticketmaster and the venue. The price of the ticket before adding the service charge is determined by the venue and/or the performer. Ticketmaster remits to the venue the price of the ticket and a portion of the service charge, as prescribed in the contract between Ticketmaster and the venue, and retains the rest of the service charge as its compensation.

Petitioners are individuals who purchased tickets for concerts through Ticketmaster. Their complaint charged Ticketmaster with violating the antitrust laws by mo-

nopolizing the business of providing ticket services for "large-scale popular music concerts" and sought recovery for alleged overcharges for ticket-delivery services resulting from the alleged monopolization.

The district court dismissed the complaint on the ground that the plaintiffs lacked antitrust standing. The court of appeals affirmed the district court's judgment as it related to damages. It held that plaintiffs were not direct purchasers of the services provided by Ticketmaster and were therefore barred by the *Illinois Brick* rule from maintaining an action to recover the alleged overcharges. The court also ruled that the allegations of the complaint did not bring plaintiffs within any exception to the *Illinois Brick* rule, and that even if the complaint had properly alleged a conspiracy between the venues and Ticketmaster, no "co-conspirator exception" to the *Illinois Brick* rule could apply since the venues were not parties to the action.

The court of appeals reversed the district court judgment as it related to equitable relief, holding that the *Illinois Brick* doctrine does not prevent indirect purchasers from suing for equitable relief.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS CORRECTLY APPLIED THE INDIRECT PURCHASER PRINCIPLE.

The decision of the Eighth Circuit is a correct application of this Court's decisions in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968); *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); and *Kansas v. Utiliticorp United, Inc.*, 497 U.S. 199 (1990). The decision does not formulate any "new rule," as petitioners contend, and is not in conflict with any other lower-court decision applying the *Illinois Brick* rule.

The court of appeals correctly treated as the essence of the "indirect purchaser" concept the fact that the purchaser has borne some portion of a monopoly overcharge imposed on another by an antecedent transaction between the alleged monopolist and the other. Such a purchaser is not permitted to sue for such an alleged overcharge, because of the impossibility of determining the incidence of the overcharge as between the indirect purchaser and the immediate purchaser, and because of the potential for duplicative recovery if both the indirect purchaser and the immediate purchaser were allowed to sue. Only the immediate purchaser may sue the alleged monopolist and that purchaser may recover the entire overcharge, whether or not any or all of the overcharge was passed on to the indirect purchaser.

The principle applies here, the court of appeals held, because the complaint makes clear that any monopoly power Ticketmaster may have is exerted against the venues, through the contracts Ticketmaster enters into

with venues and promoters to provide ticket-distribution services. Ticket services are an "input" for the venues, and the plaintiffs' complaint is that the venues "are unable to obtain a necessary input . . . in a competitive market." *Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1171 (8th Cir. 1998). The fact that plaintiffs are unable to obtain competitive ticket services, if true, "is simply the consequence of the antecedent inability of concert venues to do so." *Id.* Thus the ticket purchasers are in no different position than a buyer of bread the price of which reflects the cost of the baker's oven, or a homeowner who pays a house painter a price that reflects the cost of the paint used by the painter.

Petitioners erroneously suggest that the decision announces a "new rule of liability" under which a monopolist is immune from antitrust liability if it has engaged in "any type of antecedent transaction." Pet. i, 10, 12, 13 n.9.

Such a "rule" would be meaningless—every firm engages in a multitude of "antecedent transactions"—and is not to be found in the court of appeals' opinion. The court did not refer to "any type" of antecedent transaction but to a particular type, i.e., a transaction with a prior purchaser that is the source of the alleged monopoly overcharge. The court's statement was: "An indirect purchaser is one who *bears some portion of a monopoly overcharge only by virtue of* an antecedent transaction between the monopolist and another, independent purchaser." 140 F.3d at 1169 (emphasis added). In other words, if the prices paid by petitioners contain any overcharge due to Ticketmaster's market power, it can only be because the price reflects supra-

competitive charges exacted by Ticketmaster in its contracts with the venues. Thus petitioners are necessarily complaining that they are bearing some part of a monopoly overcharge that occurs "only by virtue of" the antecedent transaction with the venue. As the court of appeals correctly discerned, any such situation presents the problem addressed by the *Illinois Brick* rule, since the complaining purchaser is injured, if at all, only by the passing on of the overcharge involved in the first transaction.

Petitioners' only basis for claiming they are "direct" purchasers is that they pay Ticketmaster for the tickets and the service charges are separately stated. However, they do not buy the tickets "from" Ticketmaster; Ticketmaster merely acts as the venue's agent, and the tickets belong to the venue until sold. Nor do the purchasers buy services as such; the service is inseparable from the purchase of the ticket, and is provided because the venue has contracted with Ticketmaster to provide it. As the court of appeals noted, the mere itemization of a separate charge for a component of a product or service does not make a consumer a direct purchaser of the component. *Id.*

Petitioners argue (and the dissenting judge in the court of appeals agreed) that none of the burden of the alleged monopoly falls on the venues because the venues receive a portion of the service charge (and therefore benefit from any monopoly exerted by Ticketmaster). The argument mistakes form for substance. Division of the service charges is the agreed method of compensation of Ticketmaster by the venue. If Ticketmaster is exacting supracompetitive charges for its services, the

venue is giving Ticketmaster a larger split of the agreed service charge than it would have to give in a competitive market. As pointed out by the majority opinion below, the combined ticket price is obviously a price the market will bear, and therefore a venue free from Ticketmaster's alleged monopoly would not have to "cede" to Ticketmaster the same proportion of the service charge as it presently does. *Id.* at 1172.

It is clear, therefore, that if Ticketmaster had any monopoly power, the venues and promoters with whom it contracts would have standing to maintain actions under the Sherman Act to recover from Ticketmaster any monopoly overcharges for its services. That being so, the rule of *Illinois Brick* precludes plaintiffs from maintaining any such action, since the plaintiffs would be required to prove what part, if any, of the alleged overcharge had been passed on in the price of the tickets.

The reasoning of the opinion of the court of appeals was plainly correct and the decision represents a proper application of this Court's decisions in *Hanover Shoe*, *Illinois Brick*, and *Utiliticorp United*. The decision is not in conflict with any other court of appeals' decision, and there is no occasion for review by this Court.

II.

THE COURT OF APPEALS CORRECTLY RULED THAT NO "CO-CONSPIRATOR" EXCEPTION TO *ILLINOIS BRICK* WAS APPLICABLE.

Lower courts have assumed that the *Illinois Brick* rule does not apply if the direct purchaser and its supplier have conspired to violate the antitrust laws. *See, e.g., In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1163 (5th Cir. 1979); *In re Brand Name Prescription Drugs*, 123 F.3d 599, 604 (7th Cir. 1997). However, such a theory poses the risk that the accused supplier may be held liable both to the direct purchaser and the indirect purchaser—the very risk that the *Illinois Brick* rule is intended to avoid—unless the direct purchaser is bound by the judgment finding conspiracy. Therefore the courts that have addressed this issue have ruled that such a co-conspirator theory for avoiding the *Illinois Brick* rule may not be asserted unless the alleged co-conspirators are parties to the action. *Link v. Mercedes-Benz of North America, Inc.*, 788 F.2d 918, 931 (3rd Cir. 1986); *In re Beef Industry Antitrust Litigation*, 600 F.2d at 1163; *In re Midwest Milk Monopolization Litigation*, 730 F.2d 528, 529-30 (8th Cir. 1984); *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 691 F.2d 1335, 1342 (9th Cir. 1982); *see also In re Brand Name Prescription Drugs*, 123 F.3d at 605.

In this case the court of appeals rejected petitioners' attempt to assert a co-conspirator exception to *Illinois Brick* on two grounds. First, it held that the complaint contained "no proper allegation that the direct purchasers have conspired with or otherwise been party with Ticketmaster to any antitrust violation." *Campos v.*

Ticketmaster Corp., 140 F.3d at 1171. Second, the court cited its prior holding in the *Midwest Milk Monopolization* case, *supra*, as establishing that a plaintiff cannot avoid the *Illinois Brick* rule by characterizing the direct purchaser as a party to the antitrust violation unless the direct purchaser is joined as a defendant. 140 F.3d at 1171 n.4.

The first of these two grounds is not challenged by petitioners. The court of appeals' interpretation of the complaint must therefore be accepted as correct. This means that there is no need for this Court to address the question petitioners seek to raise concerning the requirement that alleged co-conspirators be joined in the action. (Question 3 of Petitioners' Questions Presented).

In any event the court of appeals' second ground presents no issue calling for review by this Court. Although petitioners weakly urge that there is a conflict among the circuits on the point, examination of the cases they cite shows that there is no conflict. Petitioners assert that the Seventh and Ninth Circuits have adopted positions contrary to the Third, Fifth and Eighth Circuits. The cases suggest the opposite. The most recent Seventh Circuit case, *Brand Name Prescription Drugs*, *supra*, refers expressly to the requirement of joinder reflected in the Fifth Circuit's *Beef Industry* decision and notes that "that requirement is satisfied" in the case before the court. 123 F.3d at 605. The only Ninth Circuit case that directly addresses the issue also adopts the Fifth Circuit's position. *In re Petroleum Products Litigation*, *supra*. The later Ninth Circuit decision cited by petitioners, *State of Arizona v. Shamrock Foods Co.*, 729 F.2d 1208 (9th Cir. 1984), treats the complaint as alleg-

ing a separate, horizontal retail conspiracy and therefore as not implicating any passing-on theory of recovery. There is no apparent inconsistency with the Ninth Circuit's *Petroleum Products* opinion and that opinion is not mentioned in the *Shamrock* opinion.[1]

There is no split among the circuits or a "gaping loophole in antitrust law enforcement" as suggested by petitioners. The court of appeals' decision that the "co-conspirator" exception to *Illinois Brick* is not applicable to this case is consistent with the opinions in each of the four other circuits that have addressed the question and presents no issue for this Court to review.

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[1] Petitioners cite *Fontana Aviation, Inc. v. Cessna Aircraft Co.*, 617 F.2d 478 (7th Cir. 1980), and *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981), as showing the existence of a conflict. Pet. at 21 n.17. Neither case supports that claim. In *Fontana Aviation*, although the Seventh Circuit recognized that there might be a co-conspirator exception to *Illinois Brick*, the court found that this case did not "fit within the Illinois Brick mold" because "Fontana does not seek damages for an illegal indirect overcharge passed on to it as is prohibited by *Illinois Brick*. . . ." 617 F.2d at 481. There was no discussion of the question whether alleged co-conspirators must be joined. Petitioners' reliance on *William Inglis & Sons* is even more puzzling. The case involved no purchases or sales, direct or indirect, between the plaintiff and the defendants. Rather, it involved an alleged conspiracy by competitor baking companies to monopolize a market for bread products.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

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SUPREME COURT, U.S.

Nº. 98-127

In The
Supreme Court of The United States
October Term 1997

ALEX CAMPOS, et al.
Petitioners,

v.

TICKETMASTER CORPORATION
Respondent.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Eighth Circuit

REPLY TO BRIEF IN OPPOSITION

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REASONS FOR GRANTING THE WRIT

I.

CONCERT VENUES ARE TICKETMASTER'S CO-CONSPIRATORS IN THE SCHEME TO RAISE CONVENIENCE CHARGES

Despite Ticketmaster's attempt to paint concert venues as victims of its monopoly power, the actual allegations of the complaint are completely to the contrary:

- "Ticketmaster has acted as the 'ringmaster' of a nationwide cartel of venues who all benefit from the lack of competition in the market for ticketing services by sharing in the supracompetitive fees charged by Ticketmaster and paid by plaintiffs and members of the class." (Apdx. C at 75-76, Complaint ¶110.)
- "Ticketmaster has conspired with arena and venue owners across the country to fix, raise, maintain and stabilize the prices of ticket distribution services provided by Ticketmaster" (Apdx. C at 76, ¶111.)

In the face of these explicit allegations, the Eighth Circuit has based its novel "antecedent transaction" rule on a fundamental misreading of the complaint. As formulated by the lower court, "[a]n indirect purchaser is one who bears some portion of a monopoly overcharge only by virtue of an

antecedent transaction between the monopolist and another, independent purchaser." *Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1169 (8th Cir. 1998) (emphasis added). Venues are anything but "independent" of Ticketmaster in this regard. As co-conspirators in the scheme to extract higher convenience fees from consumers, arenas benefit indirectly from the increase in service charges that Ticketmaster has orchestrated all across the country.

Thus, Ticketmaster is wrong when it argues petitioners do not challenge here the Eighth Circuit's statement that the complaint contained "no proper allegation" of a conspiracy between Ticketmaster and venues. *Campos v. Ticketmaster Corp.*, 140 F.3d at 1171; Resp. at 7-8. What the Court of Appeals clearly meant by "no proper allegation" is that plaintiffs had failed to name the venues as party defendants. The lower court acknowledged that "plaintiffs do characterize the venues as beneficiaries of and participants in Ticketmaster's unlawful activity. . ." [140 F.3d at 1171, n.4], but felt free to ignore these allegations because the venues were not named as actual defendants. As antitrust plaintiffs are not required to name every co-conspirator in an unlawful scheme, this holding is in error.[1]

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[1] *Fontana Aviation, Inc. v. Cessna Aircraft Co.*, 617 F.2d 478, 481 (7th Cir. 1980) ("we are not satisfied that the *Illinois Brick* rule directly applies in circumstances where the manufacturer and the intermediary are both alleged to be co-conspirators in a common illegal enterprise resulting in intended

While it may be difficult to compute exactly how much the venues and Ticketmaster would have been able to charge as convenience fees in an unrestrained market, the trial court need not undertake such a calculation. The direct purchaser of ticket distribution services, the concert-going consumer, pays the entirety of the overcharge to Ticketmaster as a separate fee. The doctrine of joint and several liability for antitrust violators permits plaintiffs "to recover the full amount of damages from some, if not all, participants," *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 646 (1981), and it does not matter how Ticketmaster has shared some of its monopoly rents with its co-conspirators.

II.

THE EIGHTH CIRCUIT'S "ANTECEDENT TRANSACTION" RULE IS BASED ON MISTAKEN FACTUAL ASSUMPTIONS

The Eighth Circuit's decision makes numerous assumptions about how the market for ticket distribution services operates which are in direct conflict with the actual allegations of the complaint. Most notably, the lower court assumed that "ticket buyers only buy Ticketmaster's services

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injury to the buyer."); *Arizona v. Shamrock Foods Co.*, 729 F.2d 1208, 1214 (9th Cir. 1994), *cert. denied*, 469 U.S. 1197 (1985) ("We hold that the policy considerations identified in Illinois Brick do not apply to the consumers' allegations of a conspiracy between the grocery stores and Shamrock to fix the retail price of those products.)

because concert venues have been required to buy those services first." 140 F.3d at 1171. Venues do not "buy" anything when a consumer pays a convenience fee directly to Ticketmaster. The only "buyer" in this transaction is the prospective concert-goer seeking to avoid the inconvenience of standing in line at the venue by purchasing his or her ticket by telephone from Ticketmaster.

The majority opinion also assumes that the combined cost of the ticket and service fees is "obviously a price that the market will bear," 140 F.3d at 1172 (citation omitted), and courts should be indifferent as to how the charges are allocated between tickets and convenience fees. In fact, the complaint alleges two separate markets whose prices move independently of each other. ("As a result of [Ticketmaster's] monopoly power, increases in ticket service charges have outpaced increases in ticket prices over the past five years." (Apdx. C at 60, ¶49.)) Consumers are entitled to purchase both tickets and ticket convenience services in unrestrained markets. If profit-maximizing venues could have raised prices for convenience fees before Ticketmaster gained its monopoly, they would have done so on their own. Consumers have paid supracompetitive prices for convenience fees and handling charges precisely because Ticketmaster has conspired with venues to violate the antitrust laws, and plaintiffs have borne the full weight of the overcharges.

III.
CONCLUSION

The Eighth Circuit's new "antecedent transaction" rule is an unwarranted extension of *Illinois Brick* which wrongly dismisses antitrust damages claims brought by consumers who have purchased supracompetitively priced services directly from antitrust violators. Petitioners respectfully request that this Court issue its Writ to the Eighth Circuit to foreclose this improper application of *Illinois Brick*.

Respectfully submitted.

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Supreme Court, U.S.
FILED
DEC 18 1998
CLERK

No. 98-127

In the Supreme Court of the United States

OCTOBER TERM, 1998

ALEX CAMPOS, ET AL., PETITIONERS

v.

TICKETMASTER CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in applying the direct purchaser rule of *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), to bar recovery of damages for alleged monopoly overcharges for ticket distribution services by claimants who, according to the court's reading of the complaint, had not purchased such services directly from the alleged monopolist.

2. Whether the court of appeals erred in holding that, in order to assert a "co-conspirator" exception to the direct purchaser rule of *Illinois Brick*, an indirect purchaser must name as defendants not only the alleged monopolist, but also the direct purchaser/co-conspirator.

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-127

ALEX CAMPOS, ET AL., PETITIONERS

v.

TICKETMASTER CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. This case concerns allegations of anticompetitive activity in the market for the distribution of tickets to large-scale popular music concerts. The promoters that promote, and the venues that present, such concerts ordinarily do not themselves conduct the transactions by which tickets to the concerts are sold and delivered to members of the public. Respondent Ticketmaster Corporation and its subsidiaries (collectively, Ticketmaster) perform that function pursuant to contracts

with promoters or venues. Pet. App. A6-A7, B29, C55 (Compl. ¶ 47).[1]

–In performing that function, Ticketmaster sells tickets by telephone, at retail outlets, and sometimes at the venue's own box office, collects payments from ticket buyers, and remits some, but not all, of the amounts collected to the venue. The ticket buyer pays Ticketmaster a sum that includes amounts separately designated as for the ticket itself and for "service," "convenience," "processing," or "handling." According to petitioners' complaint, "Ticketmaster sells 90% of all tickets to large-scale popular music concerts and has exclusive contracts with the largest and most popular arenas and venues controlling two-thirds of the market." Pet. App. C56 (Compl. ¶ 38).[2]

Petitioners, who bought tickets through Ticketmaster, filed class action antitrust suits, which were consolidated for pretrial proceedings in the Eastern District of Missouri. The consolidated complaint alleges that Ticketmaster attempted to monopolize and monopolized markets for the distribution of tickets to large-scale popular music concerts, in violation of Section 2 of the Sherman Act, 15 U.S.C. 2. The complaint further alleges that Ticketmaster and unnamed co-

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[1] For convenience, we use the term "venue" to refer to a venue, a promoter, or both, as the context requires.

[2] The complaint alludes to a Department of Justice investigation of Ticketmaster. Pet. App. C47 (Compl. ¶ 4). On July 5, 1995, the Department of Justice announced that it had "informed Ticketmaster Holdings Group, Inc., that it is closing its antitrust investigation into that firm's contracting practices" and that it would "continue to monitor competitive developments in the ticketing industry." U.S. Dep't of Justice, *Antitrust Division Statement Regarding Ticketmaster Inquiry*, Press Release 95-374 (July 5, 1995).

conspirators, including venues and promoters, entered into improper exclusive dealing agreements, fixed prices for ticket distribution services, and conspired to boycott certain performers of popular music, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1, and that Ticketmaster acquired competing firms, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18. Pet. App. A5, C70-C79 (Compl. ¶¶ 83-132).

Petitioners sought injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. 26, and treble damages under Section 4 of the Clayton Act, 15 U.S.C. 15. Pet. App. A5, C80. The claimed damages were based on alleged overcharges in ticket distribution service fees that reflected Ticketmaster's exercise of monopoly power. *Id.* at A5, C72 (Compl. ¶¶ 92, 94). Those "excessive fees," the complaint alleges, were paid "directly to Ticketmaster." *Id.* at C72 (Compl. ¶ 94).[3]

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[3] The complaint also alleges that petitioners sustained damages because they were "subject to lost or diminished access to large-scale popular music concerts" and were "foreclosed from the opportunity to be entertained by certain groups" that were boycotted by Ticketmaster and its co-conspirators. Pet. App. C72 (Compl. ¶ 94), C78 (Compl. ¶ 123). The complaint further alleges that "Ticketmaster has acted as the 'ringmaster' of a nationwide cartel of venues" in a conspiracy to fix "prices for service and handling fees" that has caused "plaintiffs to pay prices directly to Ticketmaster for tickets in excess of what plaintiffs would have paid had defendants not combined, agreed or conspired to fix ticket service fees." *Id.* at C75 (Compl. ¶ 110), C76 (Compl. ¶ 112). The complaint does not expressly allege, however, that petitioners paid higher prices for performances at those venues apart from any overcharges by Ticketmaster for ticket distribution services; rather, the complaint defines the relevant product market in terms of ticket distribution services. *Id.* at C52 (Compl. ¶ 28).

The court of appeals interpreted the complaint to seek damages only for alleged overcharges by Ticketmaster with respect to its

The district court dismissed the consolidated cases in their entirety for lack of antitrust standing. Pet. App. B28-B36. The court explained:

> It is the Plaintiffs['] own allegations in the Complaint which show that they are not best suited to bring this claim against Ticketmaster. If a violation has occurred, the appropriate party is a venue or class of venues and promoters who are the ones who "consume" Ticketmaster's product; they are the ones who would suffer any direct loss if there is [s]upracompetitive pricing in the fee contracts due to Ticketmaster's alleged monopoly power.

Pet. App. B34.

2. The court of appeals affirmed the dismissal of petitioners' damages claims on the ground that petitioners, as indirect purchasers, are barred from recovering damages under *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977). The court noted that *Illinois Brick* provides that "only the 'direct purchaser' from a monopoly supplier [can] sue for treble damages under § 4 of the Clayton Act." Pet. App. A7.[4]

The court rejected petitioners' contention that "they are direct purchasers of 'ticket distribution services' from Ticketmaster," explaining that "ticket buyers only buy Ticketmaster's services because concert venues have been required to buy those services first." Pet.

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ticket distribution services. Pet. App. A5, A7. That reading is consistent with petitioners' own characterization of the complaint. See Pet. 8 ("Plaintiffs sued to recover their payment of monopoly overcharges and to enjoin future violations of the Sherman Act.").

[4] The court of appeals concluded, however, that petitioners were not barred by their indirect purchaser status from seeking injunctive relief. Pet. App. A16-A17. That aspect of the court's decision is not at issue here.

App. A13-A14. The court observed that the monopoly price that Ticketmaster allegedly charged the venue might not be passed on at all to the ticket buyer, or at least might not be passed on in full. *Id.* at A15.

The court concluded that this case presents none of "the limited circumstances that might warrant avoidance of the direct purchaser rule" of *Illinois Brick*. Pet. App. A12. In particular, the court held that petitioners could not avoid the direct purchaser rule on the ground that the venues allegedly were "beneficiaries of and participants in Ticketmaster's unlawful activity," because petitioners had not named the venues as defendants. *Id.* at A13 n.4.

Judge Morris Sheppard Arnold dissented from the court's affirmance of the dismissal of petitioners' damages claims, disagreeing that petitioners are indirect purchasers within the meaning of *Illinois Brick*. See Pet. App. A21-A23. In his view, "Ticketmaster supplies the product [ticket distribution services] directly to concert-goers; it does not supply it first to venue operators who in turn supply it to concert-goers." *Id.* at A23. Consequently, he argued, "the entirety of the monopoly overcharge, if any, is borne by concert-goers," and "the venues do not pay any portion of the alleged monopoly overcharge." *Ibid.*

DISCUSSION

The United States believes that the facts alleged in petitioners' complaint, as interpreted by the courts below, compel the conclusion that Ticketmaster sells its ticket distribution services directly to venues, and only indirectly to ticket buyers such as petitioners. Consequently, the court of appeals' holding that the direct purchaser rule of *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), precludes petitioners from recovering dam-

ages under Section 4 of the Clayton Act, 15 U.S.C. 15, based on Ticketmaster's alleged overcharges is both correct and conventional. Petitioners do not ask the Court to grant the petition in order to review the court of appeals' reading of the complaint; that reading is, in any event, neither unreasonable nor an issue of general significance warranting the Court's attention. Nor does this case present any occasion to consider the existence and elements of a "co-conspirator" exception to the *Illinois Brick* rule. As the court of appeals correctly held, any such exception is inapplicable here, because petitioners failed to name as defendants the venues from which they purchased tickets. Accordingly, this case does not warrant review.

1. a. In *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 487-491 (1968), this Court held that a plaintiff who purchased goods or services for use in its business at an inflated price, as a result of illegal monopolization by a supplier, has suffered damage in the full amount of the overcharge for purposes of Section 4 of the Clayton Act, 15 U.S.C. 15, even if the plaintiff passed on some or all of the overcharge to its customers. It was no defense to a treble damages action, therefore, that the plaintiff shoe manufacturer had passed on to its customers, in the form of higher prices for shoes, the defendant's monopoly overcharge for shoemaking machinery. See 392 U.S. at 489 ("[a]t whatever price the buyer sells, the price he pays the seller remains illegally high, and his profits would be greater were his costs lower").

The Court specifically rejected the argument that such a pass-on defense should be available in those cases where "the buyer suffers no loss from the overcharge." *Hanover Shoe*, 392 U.S. at 492. The Court explained that allowing even such a limited form

of a pass-on defense would lead to "complicated proceedings involving massive evidence and complicated theories" aimed at demonstrating what is ordinarily close to impossible to demonstrate. *Id.* at 493.[5]

Nine years later, in *Illinois Brick*, the Court addressed a corollary question: whether an indirect purchaser, to whom a direct purchaser had passed on some or all of a monopoly overcharge, could sue the antitrust violator for overcharge damages. The State of Illinois sought in that case to recover treble damages, under Section 4 of the Clayton Act, against concrete block manufacturers, who charged monopoly prices to masonry contractors, who, in turn, submitted bids to general contractors for the masonry portions of state construction projects.

The Court first refused to "construe § 4 to permit offensive use of a pass-on theory against an alleged violator that could not use the same theory as a defense in an action by direct purchasers." *Illinois Brick*, 431 U.S. at 735. The Court explained that "allowing offensive but not defensive use of pass-on would create a serious risk of multiple liability for defendants," *id.* at 730, and that nothing in the rationale of *Hanover Shoe* would justify treating plaintiffs and defendants asymmetrically with respect to the availability of pass-on theories, *id.* at 731. The Court was thus left with the question whether to overrule *Hanover Shoe* so that

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[5] The Court also expressed concern that permitting a pass-on defense could mean that no buyer, whether a direct or an indirect one, would have a sufficient incentive to sue, so that violators of the antitrust laws would retain the fruits of their illegality. *Hanover Shoe*, 392 U.S. at 494. As this Court has since explained, that factor was of less significance than the complexities of proof. *Illinois Brick*, 431 U.S. at 732 n.12.

pass-on theories could be asserted by both plaintiffs and defendants.

The Court offered two reasons, aside from *stare decisis*, for declining to restrict or abandon *Hanover Shoe*. First, the Court explained that pass-on theories would introduce undesirable complexity into antitrust litigation, particularly in view of the difficulty of allocating the monopoly overcharge among all those who might have absorbed part of it. *Illinois Brick*, 431 U.S. at 737-743. Second, the Court observed that pass-on theories would "increas[e] the costs and diffus[e] the benefits of bringing a treble-damages action," which could "reduce the incentive to sue" and thereby "seriously impair" such private antitrust enforcement. *Id.* at 745.

The Court acknowledged that "direct purchasers sometimes may refrain from bringing a treble-damages suit for fear of disrupting relations with their suppliers." *Illinois Brick*, 431 U.S. at 746. But the Court concluded that "on balance, and until there are clear directions from Congress to the contrary," the rule allowing recovery only by direct purchasers more effectively serves "the legislative purpose in creating a group of 'private attorneys general' to enforce the antitrust laws under § 4." *Ibid.*; see *Kansas* v. *Utilicorp United, Inc.*, 497 U.S. 199, 208-219 (1990) (declining to create an exception to the direct purchaser rule of *Illinois Brick* for customers of regulated public utilities).

b. The lower courts construed the complaint in this case to state that Ticketmaster sells ticket distribution services directly to venues, and only derivatively to persons, such as petitioners, who buy tickets to attend concerts at those venues. The district court, with particular reference to the portion of the "elaborate"

and "expertly drafted" complaint "detail[ing] the contracting process between Ticketmaster and the venues," read the complaint to allege that it is the "venues and promoters who are the ones who 'consume' Ticketmaster's product" and "who would suffer any direct loss if there is [s]upracompetitive pricing in the fee contracts due to Ticketmaster's alleged monopoly power." Pet. App. B33-B34. The court of appeals likewise read the complaint as "mak[ing] clear" that "ticket buyers only buy Ticketmaster's services because concert venues have been required to buy those services first." *Id.* at A14.

The lower courts' construction of the complaint is amply supported by petitioners' specific factual allegations. According to the complaint, Ticketmaster is "engaged in the business of distributing tickets to consumers *on behalf of venues*." Pet. App. C55 (Compl. ¶ 37) (emphasis added). In pursuit of that business, Ticketmaster enters into contracts with venues "to provide ticketing services for the * * * venues." *Id.* at C74 (Compl. ¶ 108); see also *id.* at C45-C46, C53-C54 (Compl. ¶¶ 1, 3, 29). The typical contract provides that the venue is the "Principal" who grants to Ticketmaster a right "to sell [tickets] *as Principal's agent*." *Id.* at C59 (Compl. ¶ 45) (emphasis added).[6] Ticketmaster also agrees (in at least some contracts) to install equipment (presumably to be used in distributing the venue's tickets) and to spend money on promotion. *Id.* at C58

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[6] That Ticketmaster sells tickets only as agent and not as one who resells on its own account appears to be more than a formality. Nowhere in the complaint is there any suggestion that Ticketmaster ever acquires from venues the ordinary incidents of ticket ownership. Those apparently remain with the venues until the ticket is purchased by the concert-goer.

(Compl. ¶ 43). The contract sets the "service fees" and "handling fees" that ticket buyers pay. *Id.* at C46 (Compl. ¶ 2).[7] Substantial portions of the amount denominated as a service fee or handling fee are "unrelated to 'service' or 'handling'" and are remitted by Ticketmaster to the venue, typically on a percentage basis. *Id.* at C46, C59 (Compl. ¶¶ 2, 46).

In short, if the well-pleaded allegations of the complaint are construed as true, as they must be on a motion to dismiss, *Albright* v. *Oliver*, 510 U.S. 266, 268 (1994), petitioners are only indirect, or "derivative" (Pet. App. A14), purchasers of Ticketmaster's services. And that is true even though ticket buyers, such as petitioners, deal with Ticketmaster, and not with the venue, when they purchase tickets. Ticketmaster enters into a contract with the venue whereby Ticketmaster agrees to act as the venue's "agent" for ticket distribution services. Ticketmaster's services are a "necessary input," as the court of appeals put it (*ibid.*), in the product that the venue sells to the public. Those services are thus analogous to the shoemaking equipment in *Hanover Shoe* and the cement blocks in *Illinois Brick*. If Ticketmaster monopolizes the market for ticket distribution services, the immediate consequence is that the venue is unable to obtain that input in a competitive market. Any subsequent increase in costs to ticket buyers is a consequence of the contracts between the venues and Ticketmaster, together with the venues' own decisions concerning the stated prices

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[7] See also Pet. App. C53 (Compl. ¶ 30) (contracts between venues and Ticketmaster relating to events other than large-scale popular music concerts provide for "lower pricing structures"); *id.* at C60 (Compl. ¶ 50) ("service fees are often pegged to the price on the face of the ticket").

of tickets, which determine both the total amount that the ticket buyer must pay for the ticket and the incidence of any service overcharge.[8]

As petitioners emphasize, the complaint alleges that "Ticketmaster charges a 'service' and 'handling' fee paid directly by consumers to Ticketmaster." Pet. App. C45 (Compl. ¶ 2); see also *id.* at C54 (Compl. ¶ 32). Thus, although petitioners do not expressly ask this Court to review the lower courts' construction of the complaint, they argue (Pet. 2) that "plaintiffs are direct purchasers of ticket distribution services from * * * Ticketmaster." But the facts that Ticketmaster collects the money from the ticket buyer, and that part of the total sum that the ticket buyer pays to Ticketmaster is denominated as a service fee, do not alone establish that the ticket buyer is purchasing any service directly from Ticketmaster. To the contrary, according to the express allegations of the complaint, Ticketmaster acts as the venue's agent when it sells tickets. Pet. App. C59 (Compl. ¶ 45). And the designated service charge

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[8] The court of appeals said that, because the amount that ticket buyers pay for tickets (including amounts denominated as service fees) is "a price that the market will bear," a venue could charge that amount even if Ticketmaster extracted no supracompetitive fees. Pet. App. A15. That statement could be interpreted as suggesting that none of Ticketmaster's overcharge may be passed on to ticket buyers. We think it is almost certain, however, that venues, faced with an overcharge, would pass on at least some portion of it, and we do not read the court to have concluded otherwise. The context, including the quotation from *Hanover Shoe*, suggests that the court was merely observing that the venues might well absorb some portion of the overcharge, although precisely how much would be difficult to determine. See also Pet. App. A7 (noting that the district court did not question the "allegation that the plaintiffs pay some increased price for concert tickets as a result of Ticketmaster's monopoly").

that Ticketmaster collects does not represent its compensation, which is fixed by contract with the venue, usually at a different amount. *Id.* at C46 (Compl. ¶ 2).

It would be contrary to the rationale of *Illinois Brick* to allow ticket buyers to recover damages attributable to Ticketmaster's alleged monopoly overcharges merely because of the particular nature of the input that Ticketmaster supplies to the venues (*i.e.*, Ticketmaster's services as the venues' agent in dealing with ticket buyers). Clearly, the venues could also assert claims for overcharge damages as direct purchasers of Ticketmaster's services. If ticket buyers could recover damages for those same overcharges, Ticketmaster would face the risk of duplicative damages liability, a risk that this Court "d[id] not find * * * acceptable" in *Illinois Brick*. 431 U.S. at 731 n.11. Or, alternatively, the courts would have to engage in "massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge," *id.* at 737, the very exercise that the direct purchaser rule of *Illinois Brick* was designed to avoid. The courts below were not required to create a conflict with *Illinois Brick* by accepting at face value the complaint's conclusory assertion that petitioners were direct purchasers of ticket distribution services, which was contradicted by the complaint's specific factual allegations.[9]

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[9] We do not, of course, suggest that violators of the antitrust laws may avoid treble damages liability by the simple expedient of negotiating a contract that uses words describing transactions without actually creating the legal substance of those transactions. But there is no allegation here that the contracts between Ticketmaster and the venues were such a sham.

c. Petitioners suggest (Pet. 10-12) that the court of appeals adopted a sweeping new rule, extending beyond the holding of *Illinois Brick*, in stating that "[a]n indirect purchaser is one who bears some portion of a monopoly overcharge only by virtue of an antecedent transaction between the monopolist and another, independent purchaser" (Pet. App. A9). They read the court's statement as barring even a direct purchaser from suing to recover a monopoly overcharge, if the monopoly overcharge was in any way traceable to any antecedent transaction involving the monopolist and any third party. See Pet. 10-12; see also Pet. App. A21 (Arnold, J., dissenting). We agree that such a rule would find no justification in *Illinois Brick*. As Judge Arnold explained, "*Illinois Brick* requires [that] the antecedent transaction must have been one in a direct vertical chain of transactions," such that a monopoly overcharge imposed on the direct purchaser in the antecedent transaction could be passed on to the indirect purchaser in a subsequent transaction in the chain. *Id.* at A22. But the court of appeals' statement, examined in context, does not enunciate the rule that petitioners describe.

The court of appeals did not purport to be adopting any extension or modification of *Illinois Brick*. Nor did the court have any reason to do so in this case. No extension of the direct purchaser rule of *Illinois Brick* was necessary in order to bar petitioners' claim for monopoly overcharge damages. Petitioners are precluded from recovering such damages under *Illinois Brick* itself because, according to the complaint as the lower courts reasonably construed it, petitioners are not direct purchasers, but only indirect or "derivative" purchasers, with respect to the alleged monopolist, Ticketmaster.

It appears that the court of appeals' statement was simply an attempt to rephrase the rule of *Illinois Brick* in terms that would address not only the usual case in which the monopolist sells to the direct buyer who sells to the indirect buyer, but also the unusual case, such as this one, in which the monopolist, as agent for the direct buyer, deals with the indirect buyer. Accordingly, in attempting to capture the essence of what it means to be an indirect purchaser for purposes of the *Illinois Brick* rule, the court stated:

> An indirect purchaser is one who bears some portion of a monopoly overcharge only by virtue of an antecedent transaction between the monopolist and another, independent purchaser. Such indirect purchasers may not sue to recover damages for the portion of the overcharge they bear. The right to sue for damages rests with the direct purchasers, who participate in the antecedent transaction with the monopolist.

Pet. App. A9.

The phrasing of that passage may lack some precision. But the passage, read as a whole, indicates that the "antecedent transaction" is between the monopolist and a direct purchaser, who is neither the monopolist nor the indirect purchaser, and is an essential predicate to the imposition of any of the monopoly overcharge on the indirect purchaser. We understand the passage to refer to a series of transactions in which the monopolist sells goods or services to the direct purchaser with a monopoly overcharge and the direct purchaser, in turn, sells goods or services to the indirect purchaser at a price that includes all, or some portion, of the over-

charge.[10] In other words, the "antecedent transaction" contemplated by the court is just the sort of antecedent transaction that Judge Arnold understood the *Illinois Brick* rule to require. We therefore do not view the court's statement as suggesting any departure from or extension of *Illinois Brick*.

2. Although this Court has not addressed the question, several lower courts have considered an exception to the *Illinois Brick* rule that would permit the recovery of overcharge damages by indirect purchasers if the direct purchaser and the monopolist are co-conspirators. See, *e.g.*, *In re Brand Name Prescription Drugs*, 123 F.3d 599, 604-605 (7th Cir. 1997), cert. denied, 118 S. Ct. 1178 (1998). The complaint in this case alleged that unnamed venues had conspired with Ticketmaster. Pet. App. C73 (Compl. ¶ 101) ("unnamed co-conspirators"); *id.* at C75 (Compl. ¶ 110) (Ticketmaster acted as "'ringmaster' of a nationwide cartel of venues"). The court of appeals determined that, whether or not such an exception might be available in appropriate circumstances, petitioners could not avail themselves of it because "an antitrust plaintiff cannot avoid the *Illinois Brick* rule by characterizing a direct purchaser as a party to the antitrust violation, unless

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[10] As *Hanover Shoe* and *Illinois Brick* make clear, the goods or services sold by the monopolist to the direct purchaser are often an input (*e.g.*, manufacturing equipment, component materials) that goes into the production of the goods or services sold by the direct purchaser to the indirect purchaser. Thus, contrary to certain intimations of Judge Arnold's dissenting opinion (Pet. App. A22-A23), the same "product" need not be involved in both transactions.

the direct purchaser is joined as a defendant." *Id.* at A13 n.4.[11]

The requirement that an indirect purchaser who seeks to invoke a co-conspirator exception to *Illinois Brick* name as a defendant the direct purchaser through whom he purchased serves the purpose of avoiding duplicative liability, which is one of the primary concerns expressed by the Court in *Illinois Brick*. See 431 U.S. at 730-731 & n.11, 737. If the direct purchaser is not a party to the indirect purchaser's suit against a monopolist, any finding that the direct purchaser conspired with the monopolist would have no preclusive effect in a subsequent action by the direct purchaser. An inconsistent finding regarding conspiracy (or an unwillingness of the monopolist to raise the defense that a conspiracy existed between itself and the plaintiff) could result in the direct purchaser's recovery of three times the full amount of the same overcharge for which the indirect purchaser had previously been awarded treble damages. See *In re Midwest Milk Monopolization Litig.*, 730 F.2d 528, 530-532 (8th Cir.), cert. denied, 469 U.S. 924 (1984).

Petitioners observe (Pet. 21-22) that antitrust conspirators are jointly and severally liable and, consequently, cannot complain of the risk of liability for overcharges attributable to co-conspirators' conduct.

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[11] Ticketmaster contends (Br. in Opp. 7) that the court of appeals' statement that the complaint contained "no proper allegation that the direct purchasers have conspired with or otherwise been party with Ticketmaster to any antitrust violation" (Pet. App. A12-A13) sets forth an additional ground for rejecting the co-conspirator exception in this case. In our view, that statement is more plausibly read to indicate that the allegations of conspiracy were not "proper" because petitioners failed to name the allegedly co-conspiring direct purchasers as defendants.

But that observation is beside the point. The risk here is not that one conspirator will be held liable for the damages caused by all conspirators; rather, it is that one conspirator will be held liable more than once for the same overcharge damages as a result of inconsistent verdicts in suits by direct and indirect purchasers. That is precisely the multiple liability that the *Illinois Brick* rule is designed to prevent. See *In re Coordinated Pretrial Proceedings*, 691 F.2d 1335, 1342 (9th Cir. 1982), cert. denied, 464 U.S. 1068 (1984); *In re Beef Industry Antitrust Litig.*, 600 F.2d 1148, 1163 (5th Cir. 1979), cert. denied, 449 U.S. 905 (1980).[12]

Petitioners also attribute to the court of appeals the proposition that an antitrust plaintiff must name every alleged co-conspirator as a defendant. See Pet. i, 20-21.

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[12] Although petitioners suggest (Pet. 21 & n.17) that the court of appeals' decision conflicts, on this issue, with decisions of the Seventh and Ninth Circuits, we discern no conflict. The Seventh Circuit's most recent discussion of the co-conspirator exception did not reach the issue because the alleged co-conspirators had been named as defendants. *In re Brand Name Prescription Drugs*, 123 F.3d at 604-605. The earlier *Fontana Aviation, Inc.* v. *Cessna Aircraft Co.*, 617 F.2d 478, 481 (7th Cir. 1980), on which petitioners rely, contains suggestive dicta but no holding on point because the plaintiff there did not seek overcharge damages. Petitioners apparently recognize that the Ninth Circuit's decision in *In re Coordinated Pretrial Proceedings*, 691 F.2d at 1342, is consistent with the court of appeals' position in this case. They therefore rely on two other Ninth Circuit decisions, neither of which shows a conflict. No passed-on overcharge was involved in *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981), cert. denied, 459 U.S. 825 (1982). In *State of Arizona* v. *Shamrock Foods Co.*, 729 F.2d 1208, 1214 (9th Cir. 1984), cert. denied, 469 U.S. 1197 (1985), the plaintiffs did not seek overcharge damages as indirect purchasers; they sought damages only for overcharges resulting from a conspiracy among the retailers from whom they bought directly.

Such a rule could indeed tend to "frustrate private enforcement of the antitrust laws" (Pet. 24). We find no such holding, however, in the decision below. We understand the court to have held only that an indirect purchaser may not invoke the co-conspirator exception unless it has joined as a defendant the entity from which the plaintiff purchased. See Pet. App. A13 n.4 ("an antitrust plaintiff cannot avoid the *Illinois Brick* rule by characterizing a direct purchaser as a party to the antitrust violation, unless the direct purchaser is joined as a defendant"). That proposition is correct and does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1998

(5)

Supreme Court, U.S.
FILED
JAN 5 1999
OFFICE OF THE CLERK

No. 98-127

In The
Supreme Court of The United States
October Term 1997

ALEX CAMPOS, et al.
Petitioners,

v.

TICKETMASTER CORPORATION
Respondent.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Eighth Circuit

REPLY TO BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE

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This brief is submitted in response to the Brief For The United States And The Federal Trade Commission As *Amici Curiae* ("U.S. Br.")

I.

UNDER THE COMPLAINT'S CONTROLLING ALLEGATIONS, PETITIONERS PURCHASED SUPRACOMPETITIVELY PRICED DISTRIBUTION SERVICES DIRECTLY FROM TICKETMASTER

It is hornbook law that the plaintiff's factual allegations control on a motion to dismiss, and that the plaintiff is entitled to all favorable inferences that may be drawn from the complaint. *See, e.g., Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). However, in its first Question Presented and throughout its brief, the United States posits a very different rule: according to the United States, *Illinois Brick* bars the petitioners' claims here based on "the [Eighth Circuit's] reading of the complaint . . . ." The United States is even more explicit in its disregard of well-established rules of pleading when it asserts that "the facts alleged in the complaint, *as interpreted by the courts below*, compel the conclusion that Ticketmaster sells its ticket distribution services directly to venues, and only indirectly to ticket buyers such as petitioners." U.S. Br. at 5 (emphasis added).

The test for the sufficiency of an antitrust complaint cannot be whether the facts alleged can be "interpreted" in a manner that turns them on their head. In Plaintiffs' complaint

– as in the real world – Ticketmaster sells its distribution services *directly* to consumers, along with the tickets.[1] (*See* Apdx. C at 45, 53-54; Complaint, ¶¶ 1, 31-33). This service fee is separately itemized by Ticketmaster in its sales to Plaintiffs, and Plaintiffs pay the full amount of this fee to Ticketmaster. (*Id* at 45, 54, ¶¶ 2, 32.) No amount of "interpretation" or sophistry can change the relationship between Plaintiff-consumers and Ticketmaster.

Moreover, Ticketmaster sells nothing to venues. Rather, Ticketmaster *pays* venues part of its monopoly proceeds. (Apdx. C at 75-76, ¶¶ 110-111.)[2] Because Ticketmaster pays the venues, it clearly *buys* the right to collect its hefty service charges.[3] Once again, no amount of verbal acrobatics can convert the venues into purchasers.

Because Plaintiffs buy services directly from Ticketmaster, there is no overcharge for Ticketmaster to "pass on" to Plaintiffs. Therefore, the concerns of *Illinois Brick* – the likelihood of duplicative recovery and the difficulty of apportioning damages – do not come into play here.

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[1] Webster's New World Dictionary (3d College Ed. 1988) defines "sell" as "to give up, deliver or exchange (property, goods, services, etc.) for money or its equivalent." Under this definition – or any other – Ticketmaster sells services to Plaintiffs.

[2] This last fact may well explain why venues are not lining up to sue Ticketmaster.

[3] According to the Eighth Circuit and the United States, that sort of "antecedent transaction" is sufficient to invoke the bar of *Illinois Brick* even for plaintiffs who purchase from a monopolist. As Petitioners have pointed out, *all* monopolist engage in any number of "antecedent transactions" in order to obtain and maintain their monopolies. Accordingly, the Eighth Circuit's decision provides blanket immunity for monopolists.

Tellingly, while the United States quotes the relevant language from *Illinois Brick*, it does not even attempt to assert how the venues could possibly recover damages that are duplicative of Plaintiffs' damages. *See* U.S. Br. at 12. That is because the Plaintiffs alone pay the *entire* amount of Ticketmaster's monopoly overcharges, so there will be no difficulty in apportioning those damages. Nor is there a potential for duplicative damages. Even assuming that the co-conspiring venues might have suffered damages, those damages would be different in kind from those suffered by Plaintiffs, and might, for example, include lost volume in ticket sales (of which venues receive a percentage) and of concession sales. The Plaintiffs' damages – the monopoly overcharges – are unique.

Illinois Brick therefore provides no justification for the Eighth Circuit's decision. Rather, at the heart of the Eighth Circuit's decision is the assumption that, "because the amount that ticket buyers pay for tickets (including amounts denominated as service fees) is 'a price that the market will bear,' a venue could charge that amount even if Ticketmaster extracted no supracompetive fees." U.S. Br. at 11, n.8 (quoting Apdx. A at 15). According to the Eighth Circuit, then, no consumers are *ever* harmed by monopolists since the consumers will always pay the "going rate."

But this Court has refused to dismiss antitrust complaints based on such unproven economic assumptions. Indeed:

> "[l]egal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law. This Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the 'particular facts disclosed by the record.'"

Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 466-67 (1992) (quoting *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 579 (1925). Here – before Plaintiffs have even had a chance to develop the factual record – the Eighth Circuit's reliance on untested market assumptions was particularly unwarranted.[4]

Finally, the United States is unsuccessful in its attempt to limit the Eighth Circuit's "antecedent transaction" rule based upon the United States' "understanding" of the "context" of the rule. U.S. Br. at 13-15. Regardless of whatever peculiar insight the Solicitor General may have into the meaning of the Eighth Circuit's opinion, other courts can and will take the decision at its word. If a ski resort company had an exclusive contract with the forest service, and then charged monopoly prices to skiers, the "antecedent transaction" with the forest service may well prevent

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[4] Like the Eighth Circuit did here, Kodak asserted that its alleged monopoly could not have harmed consumers, since "If Kodak raised its parts or service prices above competitive levels, potential consumers would simply stop buying Kodak equipment." *Eastman Kodak*, 540 U.S. at 470. This Court rejected the argument, noting that "[t]he sales of even a monopolist are reduced when it sells goods at a monopoly price, but the higher price more than compensates for the loss in sales." *Id.*

consumer recovery. When travel agents start charging consumers for their services, and then engage in price fixing to increase those fees, the "antecedent transactions" rule may, again, prevent consumer recovery. Likewise, when licensees pay patent license fees, and then price fix the licensed product, the "antecedent transaction" rule could, again, prevent consumer recovery.

The "antecedent transaction" rule, together with the creative "interpretation" (*i.e.* re-pleading) of an antitrust complaint can bring virtually any case within the "antecedent transaction" rule, and therefore within the rule of *Illinois Brick*. This Court has never authorized such an unprincipled expansion of *Illinois Brick*. The Eighth Circuit's pernicious ruling should not be allowed to stand and take root.

II.

THE SOLICITOR GENERAL MISCHARACTERIZES THE NATURE OF THE SPLIT AMONGST THE CIRCUITS CONCERNING THE CO-CONSPIRATOR EXCEPTION TO *ILLINOIS BRICK*

As Petitioners have already pointed out, the Seventh and Ninth Circuits believe *Illinois Brick* does not mandate that a plaintiff name all the alleged co-conspirators in order to maintain suit as long as the plaintiff purchased overpriced goods or services directly from the antitrust violator. *See* Petitioners' Br. at 21-22 (collecting cases on both sides of the issue). The Eighth Circuit recognized the split when it stated

that "*In this circuit*," a plaintiff was required to join all of the alleged co-conspirators as defendants in order to avoid the bar of *Illinois Brick*. (Apdx. A at 13, n.4) (emphasis added). Curiously, the Solicitor General leaves out the highlighted language in Eighth Circuit's opinion, and claims there is no split amongst the circuits. U.S. Br. at 15-16.

The Petitioners submit that the Seventh and Ninth Circuits are correct. *See* Petitioners' Br. at 21-24. The United States and the Eighth Circuit have elevated the extremely remote possibility of duplicative recovery over the concern for strong enforcement of the antitrust laws that is at the heart of the *Illinois Brick* and of all this Court's antitrust jurisprudence. The requirement that a plaintiff name all co-conspirators means that the private-party treble damages action that Congress created to ensure vigorous enforcement of antitrust laws will be unavailable when a nationwide monopolist conspires with local entities.[5] This result is particularly unfortunate where, as here, the United States has already *dropped* its investigation of Ticketmaster. *See* U.S. Br. at 2, n.2. The result of the Eighth Circuit's ruling may well mean that – even though no one disputes that Plaintiffs have alleged massive antitrust violations – no adequate deterrent will prevent Ticketmaster from continuing its unlawful practices.

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[5] Local entities, such as venues, could only be sued in their own localities. Thus, unless private plaintiffs had unlimited resources and could file cases all over the country, the very worst sort of monopolists will go undeterred.